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CONVEYANCER'S NOTEBOOK.

Contract — preliminary enquiries. — We print the following communications received from readers:—

"I cannot agree with your contributor Mr. E. O. Walford in his opinion of 'Enquiries arising on the draft contract for sale'. In my opinion (after a good many years of experience in conveyancing) these enquiries are an *unmitigated* nuisance, and they seem to be getting more and more popular.

"In anything like a complicated title, or a complicated property, they mean going into the whole business twice over; first in drawing or approving the contract, and a second time (which may be months afterwards) in answering requisitions. Making in fact 'two bites at a cherry'.

"How much simpler to sign a contract first and investigate all details afterwards. This is bound to be the case in all auction sales anyway. No one raises 'enquiries on draft contract' in an auction room.

"There is always the right to rescind in case any serious matter arises *after* the signing of a contract, and this seems (in my humble opinion) an extremely rare occurrence.

"If there were a lot of fraudulent vendors of real property going about, elaborate precautions before signing any contract would clearly be required, but in my experience there are *not*. Houses and land are not like antique furniture. Neither are property owners scoundrels, except in very rare cases.

"To sum up my opinion. It savours of over-caution to raise these 'enquiries', and the trouble entailed by them is not justified by their result."

"With reference to the article on Requisitions on Title appearing in the 'Conveyancer's Notebook' of your March issue, though we too frequently suffer from inadequate replies, we venture to suggest that your correspondent's instance is not a fortunate one.

"Your article suggests that replies should be expressed in terms of the vendor's knowledge, and we think this might also fairly be said of the requisitions made by the solicitor to the purchaser. In the case quoted presumably the purchaser knows what he is buying and can see for himself whether or not there are any poles on the land.

"The Agreement is another matter as it is not apparent on a view of the subject-matter of the sale.

"Your correspondent writes from the point of view of the solicitor to the purchaser considering replies, but it is our experience acting for a vendor frequently to be asked to reply not only to quite superfluous and immaterial requisitions but even to quite fatuous ones. For instance, when acting for the vendor of a small cottage in a row immediately adjoining a street and a passage at the back both paved and adopted, we were asked at great length whether access to the front or northerly portion of the premises and to the southerly or rearward portion of the premises was enjoyed as of right or under licence and so forth. It was perfectly obvious the occupants stepped out of the front door straight into the street and out of the back door into the passage. Also in this inland town we are sometimes asked if there is any liability to repair sea-walls."

We should say at once that comment of this character, whether on articles or notes appearing in the Conveyancer's Notebook, are welcome. Conveyancing, unlike some other branches of the law, is essentially a "silent" art and there is no ready forum for the expression of differing views among conveyancers. It is hoped that within the limits of the space available this forum will be provided by *The Conveyancer*.

Also it should be stated that the contributor of the note commented upon was not Dr. E. O. Walford. It has been felt that generally it is convenient that the writers of these notes should be anonymous.

The writer has a good deal of sympathy with the complaints made by both the correspondents in the letters printed above. No practitioner can be unfamiliar with series of printed questions many of which can have no relation to the subject-matter of the contract

and many others to which the only appropriate reply is that the purchaser should search. To the writer's mind the cause of the trouble may be largely attributed to one root, namely, the uncertainty from which solicitors suffered after the Property Legislation of 1925. This led to the wholesale adoption of printed forms of contract, most of the clauses of which had little or no application to the property sold. The former practice of incorporating enquiries in the draft contract itself, which is clearly unexceptionable, could not be made conveniently on a very short form or a printed form on which no adequate space was provided. Furthermore, the spate of social legislation, such as the Ribbon Development Act, has led to a number of minor, but none the less severe, restrictions on property and enquiries should be made on these points. Law stationers are not to be blamed, therefore, for increasing their sales by providing printed forms which will meet all needs. There is, however, room for improvement in the use of printed forms by appropriate deletion of clauses which do not apply.

One point is clear, and that is that there is a duty on the purchaser to make personal inspection of the property. There is no need of an authority for the proposition that a purchaser takes subject to all apparent rights and the vendor has good ground for complaint at attempts to shift the onus upon him. Similarly, where an adequate root of title is provided by the contract, there can normally be no justification for making requisitions on that title prior to contract. The effect is simply to duplicate the work for the vendor's solicitor, as one of our correspondents justly points out. It is an added annoyance when the same requisition is made both before and after contract.

On the other hand there are many aggravations on a title which are not disclosed by inspection, and might or might not be a good ground for rescission, of which the purchaser should be assured before he undertakes the expense and delay of investigation of title. The Ribbon Development Act provides a simple example, but only where the land is not yet built upon. Agreements or bye-laws affecting various rights, such as drains and telephone lines, are other examples. It is a price paid for the development of so-called civilisation that these complexities should exist. The purchaser cannot be expected to know and the vendor should know. Of these limitations the vendor should be prepared to satisfy a purchaser's curiosity. The result undoubtedly is that there is a gradual tendency to enhance the importance of preliminaries to the contract. This is probably a step in the right direction and will be found to be more and more important as the practice in registered conveyancing develops.

Registered land—office copies of the register.—The following communication has been received from the Land Registry:—

"1. The Chief Land Registrar desires to inform solicitors that arrangements have now been made in the Land Registry whereby *photographic* office copies of the register can be obtained at the cost price of 1s. 6d. for each title number affected. A photographic office copy of the filed plan can also be obtained if desired, at a cost price varying with its size and complexity from 1s. upwards.

"2. By the use of office copies of the register, vendors are relieved of the burden of themselves preparing copies of the entries in the land certificate for the use of purchasers and, as such office copies are themselves admissible in evidence, purchasers are relieved of the burden of having to compare the office copies of the register supplied by the vendor with the land certificate in the vendor's possession or with the register.

"BUILDING ESTATES.

"3. On estates being sold in lots, as many office copies of the register and (if required) of the filed plan as there are plots to be sold can, on application, be obtained from the Registry at further specially reduced rates, so that the vendor may be saved the cost of printing copies of the entries in the land certificate for the use of purchasers. Where multiple office copies of the register are so issued new editions of the register rendering them out of date will not be opened by the Registry.

"4. Solicitors are warned that the practice of printing copies of the land certificate of building estates as issued at the time of first registration is highly undesirable. It overlooks the fact that each transfer of part changes the vendor's title and that any of them may involve the opening of a new edition of the register because of restrictive covenants, rights of way, etc., contained therein affecting the land remaining unsold. Such printed abstracts of the land certificate consequently become out of date and cease to be copies of the *subsisting* entries on the register such as a vendor is required by section 110 of the Land Registration Act, 1925, to furnish to purchasers.

"Their use throws the machinery of official searches in Form 94 out of gear and embarrasses purchasers as an essential feature in the smooth working of such official searches is that the copies of the entries in the register supplied by the vendor should be of the *subsisting* entries on the register, *i.e.*, up to date.

"NOTE.—A copy of the vendor's filed plan (which in the case of a building estate may be large, complex and expensive to

reproduce) is not essential for the protection of a purchaser of registered land in the same way as a copy of the plan on the conveyance to the vendor is required in the case of unregistered land.

"In the case of registered land complete protection is given to purchasers by the official search in Form 94 by which they ascertain, before handing over the purchase money, that the plot they propose to buy is in fact in the vendor's title (the only purpose served by the copy of the vendor's plan) and that no dealing adverse to them has been registered affecting it since the issue of the office copy of the register supplied by the vendor.

"H.M. Land Registry,
2nd May, 1938."

This latest example of enterprise by the Land Registry should be welcomed by practitioners. The greatest opponents of registration, among whom we are not to be numbered, cannot deny that much care is constantly being expended upon the simplification of the system. It is to be hoped that these photographic copies will be greatly used. It is presumed that they will give the date at which they were made. If they are recent copies they should eliminate some of the need for comparison with the register, save where some special question arises. When obtaining an official search on such a copy the date at which the copy was made should be clearly indicated to ensure that no subsequent entries have been made.

The special case of building estates should be noticed. It is obvious that in future photographic copies should always be employed, since, apart from them, inspection of the register is obviously necessary, as the writer has several times emphasised. What is not clear, however, is how these photographic copies are to be aligned with changes on the ground, coupled with varying stipulations inserted as the estate develops. It is well known that these changes have been a source of embarrassment to the Registry and to purchasers. It is not clear how, if at all, these changes are to be regulated under the proposed system of photographic copies. It is hoped that the Land Registry will make this clear.

The Note to this announcement is more difficult to comprehend. It would seem to suggest that it is unnecessary to obtain copies of plans, particularly where they are large and complex. Under section 110 of the Land Registration Act a purchaser is always entitled to a plan, and no practitioner would be wise in dispensing with it, unless, where the transaction does not exceed £1,000, the purchaser is unwilling to bear the expense. In practice the expense

is borne by the vendor despite the provisions of the Act. What it is difficult to see is how a purchaser without such a plan is in a position to satisfy himself, particularly in a complex building estate, whether the land contracted to be sold is on the title, *e.g.*, if referred to by a plot number. In any event Form 94 only requires a plan where the purchase is of part of the land comprised in the title and not even then when the plot number is given. Contracts frequently do not have as plans extracts without alteration from the Land Registry Map. Furthermore, the plan commonly shows certain overriding interests, which, despite the attitude of the Registry, practitioners will continue to regard as important, and the nature and exact extent of boundaries and similar matters. On these questions the official search has no bearing. Owing to the comparatively brief verbal description of the property contained on the register we would have said that the plan was a great deal more important to a purchaser of registered than of unregistered land, even in the case of building estates. It is not primarily a question of protection, but the problem of whether the purchaser is getting what he contracted to buy. In building estates, even of registered land, plans present great difficulties owing to the changes in boundaries made in the course of development. Unless the plan supplied is very up to date it will be necessary to make a personal search at the Registry to ensure complete satisfaction, and even then it is not free from objection owing to the time element. Practitioners are reminded of the necessity of impressing on clients developing building estates the importance of constant touch with the Survey Department of the Registry and immediate information of any changes in the layout of the estate.

Registered land—Report of Chief Registrar.—The most important part of the Chief Registrar's Report for the year 1937-38 (*a*) is that which deals with the experience gained in the application of compulsory registration to Middlesex. This is the first really large extension of the system. Among other things the Chief Registrar points out that there is an estimated surplus of £16,000 out of a total estimated income of £107,000 and that this removes any apprehension arising from the burden of rent on premises for any future extension of the system.

The Chief Registrar points out with justifiable pride that the result of this experience completely negatives the forecasts of disaster

(*a*) Report to the Lord Chancellor on H.M. Land Registry for the Year 1937-38. H.M. Stationery Office. Price 6d. net (postage extra).

and delay prophesied by counsel before the Royal Commission on the Land Transfer Act. In fact the average time taken in the grant of titles on first registration for Middlesex has been 7.6 days.

Another important aspect of this experience is that there is no need for the expense, and incidentally delay, of preparing a re-survey of the ordnance map before imposing compulsory registration. Such difficulties as have been met are due to rapid and recent development. It is impossible in practice to meet these by a re-survey. This is probably the most striking fact mentioned in the Report because it was generally felt in the profession that no rapid strides would be made with compulsory registration owing to the necessary delay of preparing ordnance maps suitable for the purpose. As it turns out the two main handicaps to extension, namely, the expense of extending the Land Registry premises to meet the needs of an expanding staff and the expense and delay of preparing appropriate maps, appear to have been shown to be mythical.

The whole tenor and phraseology of this Report seem to contemplate that additional and comparatively rapid extensions of the compulsory system will be made. This fact is of vital importance to the profession. This generation will not be seriously affected in professional income, because compulsory registration involves investigation of title prior to registration and unregistered conveyancing will continue with the addition of the professional assistance in completing first registrations.

The importance of this extension, however, is not one primarily of professional income. Experience shows that outside the compulsory areas the profession are still lamentably ignorant of the law of registered conveyancing. This is due in part to the failure of those concerned with the instruction of articled clerks, who are inclined to regard registered land as an unnecessary and unimportant appendix to the Land Law. Whatever may have been the position this is no longer the case. But even in the compulsory areas practitioners are too apt to regard registered conveyancing as a matter of completing certain printed forms containing as few variations as is possible. We would emphasise that this attitude is unfair to clients. The law of registered conveyancing is as complex in its own way as that of unregistered conveyancing. The problems are not dissimilar, though time may be saved in the actual investigation of title by the comparative simplicity of the register. In fact, in registered conveyancing the contract will probably play a larger part even than in unregistered conveyancing. What, however, is more to our present purpose is the need for a more adequate and scientific study of the appropriate subsidiary clauses and provisions in transfers and mortgages (leases are scarcely affected apart from

the necessity of registration) in order to place clients in an equivalent position to that enjoyed in unregistered conveyancing. The indiscriminate use of printed forms will lead to unforeseen, and possibly undesirable, consequences. Therefore, we would urge upon the profession the necessity of making a thorough study of this subject.

These observations may be enforced by reference to the present position. Last year in the non-compulsory areas 3,212 new titles were registered, and in the same area 88,664 dealings took place. The grand total of dealings, including compulsory and non-compulsory areas, was 286,309. This is a large volume of business. It reflects great credit on the Registry for its speed and efficiency. It is a warning to practitioners that they cannot expect to avoid clients who are interested. This is emphasised by the additional information that there are now 747,800 separate titles involving an estimated capital of £544,000,000. All practitioners might wish to share in this, particularly when dealings have taken place to the number of 2,698,000 and of the estimated value of £1,906,000,000 !

This is clearly the Report of an important Government Department. Practitioners deserve their share in the administration of its work. This will only be accomplished by acquiring the same, or a greater, degree of skill and learning as they had of the old system. Officials inevitably prefer that as many matters as possible should be capable of being treated as matters of routine. The profession by its skill and learning must be able to press upon the Registry the necessity of individual variations. The writer is convinced that the circumstances of land law do not permit of rigid simplicity and complete conformity with routine. It is the part of the profession to insist and by the weight of learning to ensure that the land law is not too restricted.

Intestate's residuary estate.—The writer of the letter printed, with the draftsman's observations, on p. 200, *ante*, sends the following reply:—

"I cannot expect the learned draftsman to revise his considered opinion, but I still am not convinced that, notwithstanding section 33 of the Administration of Estates Act, 1925, administrators can appoint trustees until they have impliedly assented to the vesting of the property in themselves as trustees within the principle laid down in *Re Ponder*, [1922] 2 Ch. 59, and applied in *Re Pitt* (1928), 44 T. L. R. 371, or that they can subsequently properly sign an assent *as personal representatives*.

"I think, moreover, we may have still to learn whether the

unfortunate phrase 'and upon the proper trusts, if any,' contained in section 36 (7) means 'and that the trusts, if any, set out in the assent or conveyance are the proper trusts affecting the premises comprised in the assent or conveyance'.

"As to stamp duty the Controller of Stamps has given his opinion that section 36 (11) does not exempt all assents. He agrees that it exempts assents to effect appropriations in favour of specific, or residuary legatees, or devisees, or persons interested in the estate of an intestate, other than an appropriation in satisfaction of a surviving spouse £1,000 and interest. My view, although I have not had occasion to test it, is that he would hold the assent in question came within section 62 of the Stamp Act, 1891."

We have also received the following letter, arising out of the same draft:—

"The writer wishes to pursue the inquiry a stage further and to ask whether the new Trustees for Sale, when appointed, have power to postpone sale of unauthorised investments which are so transferred to them. The position seems to be clear where the administrators have already taken the step of selling unauthorised investments and placing them in trustee securities, but there seems to be considerable doubt among members of the legal profession as to whether new trustees who are appointed by administrators and in the place of them, can in fact accept from the administrators unauthorised investments and, if they do accept them, whether or not they are compelled immediately to convert them into Trustee securities.

"Opinion on the point seems to be fairly divided. Some, while admitting that it seems contrary to the spirit of the Act that such power to postpone should be denied to the new trustees, are yet unable to supply any authority in support of their opinion and it is this authority which the writer seeks."

The learned draftsman replies as follows:—

Section 33 of the Administration of Estates Act, 1925, is not a very happily worded section. Its provisions make no distinction between the period when administrators are acting strictly in that capacity and the subsequent period when, the debts, funeral and testamentary expenses having been paid, they are retaining the estate on the statutory trusts during a minority or life interest. It seems, however, implicit in the section, and this view is borne out by the only two relevant decisions on this matter, that there is no distinction between the powers of the administrators in these two periods.

In order to ascertain the powers of new trustees of the statutory trusts it is necessary to consider section 33 in some detail. Sub-section 1 provides : " On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon trust to call in, sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper. . . ." Sub-section 2 provides for the payment of debts, legacies, etc. By sub-section 3 the personal representatives are given power, pending the distribution of the estate, to invest the residue of the money in any investments for the time being authorised by statute with power to change such investments. Sub-section 4 then provides as follows : " The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as ' the residuary estate of the intestate '."

It is clear from these provisions that personal representatives have the fullest power to postpone sale. Such a power is expressly given to them by sub-section 1, and sub-section 4 contemplates that when the debts, etc., are paid the residuary estate of the intestate will include unsold parts of the estate. In these circumstances, if the personal representatives appoint new trustees of the statutory trust for sale declared by sub-section 1, there seems no reason why the power to postpone sale and retain unauthorised investments should not devolve on such new trustees. The general rule is that new trustees have the same powers, authorities and discretions as if they were the original trustees : see section 36 (7) of the Trustee Act, 1925. There is nothing in the section which expressly cuts down the powers of the trustees so appointed and differentiates them from the personal representatives, the original trustees. It woud seem therefore that they have similar powers.

This view is borne out by the case of *Re Yerburgh*, [1928] W. N. 208. Here Romer, J., as he then was, held that administrators, having paid the deceased's debts and general expenses of administration, should make a vesting assent, vesting the deceased's land in themselves as trustees. It is to be observed that the power to postpone sale conferred by sub-section 1 applies as well to the personal estate as it does to the land, but it seems clear

that the learned Judge contemplated the personal representatives, as trustees, retaining the land. If the section authorises the postponement of the sale of land, there seems no reason why unauthorised investments should not equally be retained.

In *Re Wilkes*, [1935] Ch. 645, the question raised was whether English administrators were entitled by virtue of section 33 (1) to postpone the sale of unauthorised investments, being shares in a private company, notwithstanding the fact that according to the law of the domicil of the beneficiaries, who were infants, such postponement was illegal. Farwell, J., held that the administrators could exercise the power to postpone sale given to them by section 33, until they could get a good discharge from the beneficiaries. He plainly contemplated an indefinite postponement. As the beneficiaries were infants, it was obviously possible that the administrators might desire to retire and appoint trustees to succeed them. There is nothing in the judgment to suggest that such new trustees would have to sell the unauthorised investments.

In principle it seems wrong that the power to postpone sale, which is conferred on personal representatives on the ground that it is beneficial, should cease to be exercisable by new trustees. If this were the law, the result might be oppressive. There is nothing in the section to suggest that a change in the trusteeship has this result. In these circumstances, it seems that new trustees of the statutory trusts appointed in the place of personal representatives have power to take a transfer and to postpone the sale of unauthorised investments.

The following note is contributed by Mr. L. A. Blundell :—

Forfeiture notice under section 146—*under what circumstances lessee to pay compensation.*—Attention has been drawn by a subscriber to a point of some importance in connection with the service of notices under section 146 of the Law of Property Act, 1925. The point arises out of an article in Volume 1 of this Journal, at p. 261, entitled " Costs incurred on Notice of Forfeiture of a Lease ", but was not dealt with expressly there as the article was primarily concerned with solicitor's and surveyor's costs incurred on service of the notice.

It is there pointed out that section 146 imposes a double duty upon a lessee on whom a notice under the section is served : he must, within a reasonable time after service of the notice, remedy the breach if it is capable of remedy, and make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

A partial remedy is not within the section: see *Rugby School (Governors)* v. *Tannahill*, [1935] 1 K. B. 87, *per* Maugham, L.J., at p. 93. The position was therefore stated in these words in the article above referred to: "If the lessee omits to do either of those things then there has been a failure on his part in carrying out the duty which is cast upon him if he wishes to avoid a forfeiture, and so the right of re-entry has become enforceable."

The query now raised is as to whether these words mean that wherever the lessor in a notice under section 146 requires breaches to be remedied and compensation to be paid, the lessee is bound in every case to pay such compensation in addition to remedying the breaches, if he wishes to avoid proceedings for forfeiture. This, however, is quite a different thing from the proposition contained in the words cited above. The true position is that if the lessor demands compensation in money as well as the remedying of breaches, the lessee is to remedy the breaches and make, not necessarily the compensation claimed, but *reasonable compensation in money, to the satisfaction of the lessor.* The reasonable compensation which he must make as a condition of avoiding a forfeiture is to be measured, not by the lessor's claim, but by the rule laid down by the Courts; and the measure of compensation was stated by Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J., in *Skinners' Co.* v. *Knight*, [1891] 2 Q. B. 542, to be the same as the measure of damages in an action for the breach. That is to say, the test is the extent of the injury to the landlord's reversion.

It follows from this that if the lessee has so remedied the breaches that there is no injury to the reversion, no compensation need be paid by him. The limit of the compensation payable is that which is reasonable, and if there is nothing to compensate for, no compensation is reasonable. This in fact is the view expressed by the correspondent raising the query, and there is no doubt that it is correct. Confirmation of this view is to be found in *Skinners' Co.* v. *Knight*, *supra*, where the Court of Appeal says: "The lessee is bound to make compensation, not absolutely in every case, but only where there is something to compensate." A similar statement is made by Lord Esher, M.R., in *Lock* v. *Pearce*, [1893] 2 Ch. 271, at p. 276. The Court of Appeal is in these cases only stating the same principle in another form: the statute requires *reasonable* compensation to the satisfaction of the lessor, to be made in every case, and whether any compensation is reasonable depends upon there being something for which to compensate.

It may be noted that the way in which the words "to the

satisfaction of the lessor" are used is a little curious. "Reasonable" compensation is to be paid, and nothing more, but that may not be to the satisfaction of the lessor. It would seem that the words are directed to the case where the lessor is satisfied with a lesser sum than could actually be claimed as reasonable.

A word must be added as to those cases where it appears that by reason of the breaches having been remedied there is no injury to the reversion. In the special circumstances of particular cases, there may conceivably be some degree of injury notwithstanding the remedying of the breach. It might be suggested that a landlord wishing to sell had lost the best market for his reversion. Or it might be proved in a special case, for example, that a particular kind of property was of less value after it had been dilapidated and renovated than if it had been properly maintained all the time. But such cases would have to be proved according to their special facts; and in some cases it might be advisable to pay a nominal sum as compensation to protect the lessee in respect of any slight outstanding injury to the reversion. Where, however, it is clear that there is no injury to the reversion, as in the ordinary case where all breaches have been remedied, there is no doubt that no compensation need be paid by the lessee.

PUBLISHERS' NOTE.

The publishers apologise to subscribers for the awkward numbering of the last sixteen pages of the magazine. Arrangements have been made so that in future an extra sixteen pages will be available in each part, which will prevent both a repetition of this, and, it is hoped, the crowding out of a number of notes of cases, such as has unfortunately been necessary in this part.

RIGHTS OF WAY: THE RIGHT TO DEVIATE.

By Robert Grundy, LL.M., Solicitor.

The question regarding the right to deviate from a defined way is one which often arises and is one concerning which there is unfortunately little judicial authority to afford any guidance to the practitioner, since, although numerous cases have arisen in the past (and still frequently do arise), they have not always come before the Courts for decision.

In the first place, it is obvious that this question of deviation may arise from many different causes, as, *e.g.*, when the way itself is rendered absolutely impassable, or when, through want of ordinary repair, or the accumulation of mud, it is in a state which renders it inconvenient or reasonably unfit for passage, or when the way is rendered impassable or less commodious by reason of some obstruction which has been placed upon it, or when the way is either totally or partially destroyed through a landslide, the encroachment of the sea or any other natural cause. It may easily be appreciated that in all these, and in other similar cases, an important question is likely to arise as to whether a person entitled to use the way may pass over the adjoining land, or whether he must keep to the path, however inconvenient it may be for him, or even give up his right altogether if the way happens to be completely stopped up. This important question may, apart from any judicial guidance, be largely determined on common-sense principles of equity, and a logical approach to such determination seems to be to insist upon a rigid classification of the various ways in which a way may become wholly or partially impassable.

The numerous ways in which a way may become impassable may conveniently be divided into (a) cases where the impassability arises from some natural cause, *e.g.*, the fact that a way, being close to the sea or a river, is regularly covered with water at high tide, or the fact that it has been altogether swept away by a violent storm, and (b) cases where the impassability arises through some act of the owner of the soil.

Regarding those instances in which the way is rendered impassable owing to some natural cause, it is generally found convenient to draw a line of distinction between periodical or

regular interruptions, and those interruptions which are of infrequent or very rare occurrence due to some extraordinary cause, the former kind of interruption affording on the surface much more justification for deviating over the adjoining land of the owner than the latter.

If a way, to take a common example, be close to the sea or to a tidal river and is regularly covered with water at high tide or periodically when such high tides occur, it must be said that the existence or non-existence of a right for the public or for the owner of a private right of way to walk over the adjoining land must in every case depend entirely on the evidence. Under ordinary circumstances, it would appear that there is *prima facie* no such right, and that, in the absence of evidence to the contrary, it would be presumed that the dedication or grant (as the case may be) was made subject to the periodical interruption, there being no reason for presuming that in addition to the right to traverse the path, the owner of the soil gave a further right to deviate over his land when the path was interrupted.

There does not appear to be any precise authority for this proposition, but it has been held in *Arnold* v. *Blaker* (1871), 6 Q. B. 433, that a way may be dedicated to the public subject to the right of the grantor to obstruct it periodically by ploughing up the soil, and that the public have, in the absence of evidence to the contrary, no right to walk over the adjoining land when the path is less convenient owing to its being ploughed up. It is submitted that the same reasons which prompted that decision would apply equally well to cases where a way is periodically interrupted by the rising tide or by any other such cause.

Although it may be possible to raise a presumption of a right to deviate on satisfactory evidence in the case of periodical interruptions, no such presumption may conceivably be drawn if, instead of being regularly or periodically obstructed by the sea, the way is only interrupted by some extraordinary cause, as by a flood. In this case, such interruption is one which is not likely to have been in the contemplation of the parties at the time of the grant (or dedication), and consequently there is no reason for presuming the grant of a right to deviate from the path.

The law seems to be quite clear, however, in cases where the way is destroyed by some natural cause. If, *e.g.*, a way is either wholly or partially swept away by some violent storm, landslide, earth tremor, or other natural cause, there appears to be no doubt that all rights of way are totally and irretrievably lost, and that there is therefore no right to walk over the adjoining land. That this is so seems clear from the decisions given in several early

cases (mostly dealing with indictments for the non-repair of highways). Thus, in *R.* v. *The Inhabitants of Hornsea* (1854), 1 Dears. C. C. 291, a public road ran alongside a cliff which was washed away by heavy seas, and it was held that the parish could not be called upon to repair the part which had been washed away, because the road had absolutely disappeared. But on the other hand, in the later case of *R.* v. *The Inhabitants of Greenhow* (1876), L. R. 1 Q. B. D. 703, the parish was held bound to repair a road which ran along the slope of a hill and which was temporarily destroyed by a landslide. The difference between the two cases lies in the fact that in the latter a trace of the old road still remained, and it was possible to repair it at moderate cost, whereas in the former case the soil was completely swept away, and hence there was no such liability.

In view of these authorities, therefore, it is only reasonable to infer that whenever a right of way is destroyed by any natural cause, and therefore totally extinguished, no new right of way comes into existence over fresh soil, for no such right can possibly arise except either by a fresh grant (in the case of a private right of way), or by a new dedication to the public (in the case of a highway).

To summarise the position briefly, it may be said that in all cases of a way being rendered impassable through any of the natural causes that have been mentioned, there cannot under ordinary circumstances be presumed to be any right to deviate over the adjoining land of the owner of the soil, in the absence of any evidence to the contrary. This is not so, however, in the second class of case in which a way may be rendered wholly or partially impassable, namely, by some obstruction placed upon the way by the owner of the soil himself: *R.* v. *Oldreave* (1868), 32 J. P. Jo. 271. In these circumstances the authorities show that the person or persons entitled to a right of way over the road upon which the obstruction has been placed would, if the obstruction does not allow of easy removal, be justified in passing over the adjoining ground in order to get round the obstruction, provided that the adjoining ground belongs to the owner of the soil over which the road runs, and provided also that the deviation is reasonable for the ordinary enjoyment of the right of passage. The question whether or not the exercise of this right of deviation is, in the circumstances, reasonable is, of course, a question of fact in each case, regard being had to the nature of the *locus in quo* and the extent of the right of way. Thus, the deviation was held to be justifiable in *Hawkins* v. *Carbines* (1857), 27 L. J. Ex. 44, in which the grantor of a right of way had, subsequently to the

grant, materially reduced the width of the way so that the grantee could not enjoy his right of passage as fully and as commodiously as at the time of the grant. The grantee's complaint was that he was not able to turn his horse and cart round as conveniently as he could before the alteration, which rendered it necessary for him to go a little further on to the grantor's land for this purpose. The Court held that the action of the grantee in going further on to the grantor's land was justifiable, since only by doing so could he obtain full enjoyment of his right : see also *Selby* v. *Nettlefold* (1873), 9 Ch. App. 111.

It is necessary that emphasis should be given to the fact that the right to deviate, where it exists, is strictly limited to the land of the grantor of the right, since it is sufficiently obvious that were it otherwise the deviation would necessarily be a trespass against another landowner, and in no circumstances can a person having a right of way along a certain road or path claim to have a right to encroach on to any land other than that belonging to the owner of the soil for the purpose of enjoying his own right, in the absence of any grant or act of dedication by any such other owner.

Furthermore, the right of deviation in such circumstances over the land of the owner of the soil continues for so long as the obstruction remains, in exactly the same way in which a way of necessity continues for so long as the necessity giving rise to it continues (*Lovell* v. *Smith* (1857), 3 C. B. (N.S.) 120), and although it is not incumbent upon the grantee of a way to enter into litigation in order to effect the removal of the obstruction and thus protect his original right of way, long acquiescence in the continuance of the obstruction and the consequent user of the substituted way, may render it difficult for him ultimately to insist upon the removal of the obstruction : *Selby* v. *Nettlefold*, *supra*. In the case of a public highway, any action to effect the removal of any obstruction will have, generally speaking, to be brought by the Attorney-General, except in cases where an individual member of the public suffers special damage or inconvenience, when such person may bring an action personally.

Ordinarily, the erection of a gateway across the road or path is not deemed to constitute an obstruction unless it amounts to a substantial obstruction, whereas in the case of a public highway, any obstruction is actionable if appreciable. That, I think, is the recognised distinction : *Pettey* v. *Parsons*, [1914] 2 Ch. 653.

In cases where ways have become impassable through want of ordinary repair, a distinction has, in the past, been drawn between public and private ways, in that as regards the former, the public

have a right to walk over the adjoining land, whereas as regards the latter, a grantee of a private right has no such privilege. It has been said that the reason for this distinction is that it is in the public interest generally that a passage should be afforded to the public at all times, but that the same reason does not exist in the case of a private right of way. This view was taken by Ellenborough, C.J., in *Bullard* v. *Harrison* (1815), 4 M. & S. 387. It is undoubtedly difficult to appreciate this distinction, and it is certainly not easy to see any reasonable ground for it at all, for the reason which has been suggested for the distinction definitely appears to be contrary to the fundamental principle of law that no right in another person's soil can be acquired by any means other than by the express or implied act of the owner of the soil, and, as is well known, a right of way can only arise either by dedication to the public or by grant, express or implied, to an individual. Since such dedication or grant is in all cases the voluntary act of the owner of the soil, it is therefore manifestly absurd to suggest that merely because a road which the owner of the soil has dedicated to the public is out of repair, he is bound to allow another right of way over such other portion of his land as the individual members of the public choose, since, if that were the case, it would be tantamount to holding that a public right of way may come into existence otherwise than by the act of the owner of the land, and even against his will. When, however, it is borne in mind that the obligation to repair a way, if any, is generally upon the person or persons who have the use of it, and not on the owner of the soil, the suggestion that the public, who ought to maintain the way in good repair, can, by neglecting the obligation, substitute for themselves another way, is certainly unreasonable on the face of it.

The opinion that, if a public way is out of repair, the public may pass over the adjoining soil was somewhat severely shaken by the remark of Blackburn, J., in the case of *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96, at p. 99. It was put forward in the argument that it was laid down in all the text-books that if a public way is foundrous and impassable, the public have a right to go on to the adjoining land. But his Lordship remarked that the foundation for that *dictum* was *Duncomb's Case* (1634), Cro. Car. 336, but that it would be found upon examination that the facts in that case were that the defendant had himself narrowed the way. In view of this the learned Judge remarked that in that case the road was not merely out of repair, but the grantor of the right had by his own act interfered with the right which he had given to the public.

REMAINDER TO "SURVIVOR" OF PERSONS FOR LIFE ONLY: VESTED OR CONTINGENT?

Re Legh. Whitby v. *Von Luedecke.*

(*Joint Tenancy for Lives.*)

By F. E. Farrer, of Lincoln's Inn.

It is completely settled by the Court of Appeal (*a*) that if there be a trust for two or more during their *joint* lives, whether the words *joint* lives be actually used, or necessarily inferred as would be by reason of the next following remainder (*b*), with remainder as to the whole to the "survivors" or "survivor" of them, though but for their lives or life, then that the remainder must necessarily be contingent and not vested.

The first limitation or trust carries the property only for the period measured by the life of the first of the beneficiaries to die; consequently the enjoyment of the property between the death of the first and the last of them to die is not disposed of by the first limitation or trust, and consequently forms the subject of the remainder, and since it is uncertain which will be the survivors or survivor, the remainder is necessarily contingent.

But the donor can easily achieve his object practicably in one of two ways. He can give one moiety to A for life with remainder to B for life and the other moiety to B for life with remainder to A for life: in either of which cases the remainder will be vested and not contingent (*c*). For to make a vested remainder for life or in tail in any ascertained person it is not the least necessary that the remainder should ever fall into actual possession (*d*). And the number of recipients makes no difference. Let them be twenty; of course to write out in full all combinations for such a case would be impossible: but it can be compendiously done by way of cross-remainder, as: "I give all my property to my trustees upon trust for [here name the twenty] hereinafter called 'the

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(*a*) *Re Legh*, [1938] 1 Ch. 39. See also the argument for the losing side in *Doe* v. *Wilson*, 4 B. & Ald. 303.

(*b*) *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783, on this particular point of contingency only affirmed in *Re Legh*, *supra*.

(*c*) *Re Legh*, [1938] 1 Ch., at pp. 45, 47.

(*d*) Fearne, 215, 216, and it may be here remarked that a remainder to X will be vested, though expressed in words denoting contingency, provided that all possible contingency is exhausted so that A must take in any case: Fearne, 19.

beneficiaries' in equal shares and so that each such beneficiary shall take his or her share for his or her life only with remainder as to his or her share original and accrued in trust for the others (*e*) or other of such beneficiaries if more than one equally and so that each such beneficiary shall take for his or her life only with remainder after the death of the last survivor of the beneficiaries upon trust for X", etc. Again—what would be simpler—the donor might give in trust for A and B, or to the twenty, without using words of severance (which words of severance occurred in *Re Legh* (*f*)), "for their lives"—not on any account "for their *joint* lives". This would make them joint tenants for life, and each would consequently be seised or possessed of the *whole* subject-matter for the *whole* of his or her life—for a vested, not contingent, estate. We shall elaborate this point later and consider the effect of a severance of this joint tenancy for life. And here we may remark that when a joint tenancy for lives is intended, the strictly proper course is to give without any words of severance (*g*) to the donees "for their lives" simply (*h*). But if the words "and for the lives and life of the survivors and survivor of them" be added, this will not alter the matter; for they but express in words what, without those words, the law would make of the simple gift "for their lives" (*i*).

We may add, too, that after a gift of successive life estates to A, an uncle, and B, a nephew, then a trust of the income "for life" for any of A and B's immediate descendants, "and from and after his or her decease" over, concludes the ascertainment of the class at the death of the survivor of A and B, and so avoids any question of perpetuity, and gives a valid joint tenancy for lives to the descendants then living (*j*). We shall discuss later the matter of a joint tenancy for lives, because of certain matters to be considered should the joint tenancy be severed, or determined otherwise than by death.

It is obvious that for the question of the modern rule of perpetuity it is of the utmost importance to decide whether the

(*e*) As the beneficiary is given a full life interest in the whole of his share, the substitution here of the words "survivors or survivor" for others or other would not make the remainder, being for life only, contingent, but would give a vested remainder. See *Fortescue* v. *Abbot* (A.D. 1676) Poll. 479; Sir T. Jones, 79; Fearne, 243, stated *post*.

(*f*) See [1938] 1 Ch. 39, at p. 45.

(*g*) Owing to the tendency of the Court to find tenancy in common on slight words appearing anywhere in the document, it is better expressly to say "to A and B as joint tenants for their lives".

(*h*) Litt., s. 277, which so long as the joint tenancy continues unsevered or undetermined (as to which, see *infra*), effects a provision for the survivors or survivor taking the whole for the rest of their or his lives or life: ss. 280, 281, 282.

(*i*) Co. Litt. 191 (a) and note, *Doe d. Dormer* v. *Wilson*, 4 B. & Ald. 303.

(*j*) *Re Roberts*, 19 Ch. D. 520, C. A.; Gray, Perpetuities, 232 (a).

remainder is vested or contingent : the rule has application only to the vesting in interest of a limitation or trust in due time; it has no application whatever to the date of a limitation once so duly vested in interest falling into actual possession.

The case of *Re Legh* (*k*) was as follows. The testator had *special* power of appointment in favour of certain objects of the power of *personal estate* vested in trustees, created by an instrument coming into operation before A and B, who were amongst the objects, were born. By will the testator appointed a share to be held upon trust during the *joint* lives of A and B to pay the income to them as tenants in common and after the death of either of them to pay the whole income to the survivor of them during the residue of his or her life. The Court of Appeal held the remainder for life to the survivor to be contingent, and consequently void, since the modern rule of perpetuity unquestionably applies to limitations or trusts of personal estate, or what may be miscalled equitable contingent remainders in real estate, or executory limitations or trusts of real or personal estate. Sir Wilfrid Greene, M.R., said at p. 44 : " If upon the true construction of the language used the legal character of the interest created is one which attracts the operation of the rule [the modern rule against perpetuities] it is immaterial that this result might have been avoided by the use of different language creating an interest different in legal character though the same in practical effect."

It will be observed that during their joint lives A and B were expressly tenants in common in this case, but the principle would have equally applied had they been made joint tenants during their *joint* lives.

The Court of Appeal expressly approved the actual holding of contingency in the earlier case of *Whitby* v. *Von Luedecke* (*l*), but must not be taken as in any way approving any suggestion that the modern rule of perpetuity ever applied to a *legal* contingent remainder in real estate. The case of *Whitby* v. *Von Luedecke* (*l*) was shortly as follows. Under her ante-nuptial marriage settlement, made in 1844, a mother who died on February 15, 1877, was seised for her life by way of resulting use of real property, with remainder amongst the issue of that marriage as she should by will appoint, and in default to the children of the marriage as tenants in common in tail. There were two daughters of that marriage, Ann and Lucy. The mother by will appointed that the rent of the property should be equally divided during their respective lives between Ann and Lucy and that in the event of the

(*k*) [1938] 1 Ch. 39.
(*l*) [1906] 1 Ch. 783.

death of either the survivor should receive the whole rent, and "at the death of my last daughter" the land was appointed over. Lord Wrenbury, then Buckley, J., held (1) that the remainder for life was contingent; (2) apparently supposing that the modern rule of perpetuity applied to a *legal* contingent remainder in real estate that such remainder was void. It is submitted that the latter reason was bad (*m*), but that the actual result was right, for that he should have held that the contingent remainder failed as such for not vesting during the only particular life *estate* (the mother's) subsisting when the marriage settlement came into force (*m*). On the contingency point, though the expression "for their *joint* lives" was conspicuously absent, nay, indeed, negatived by the words in the first limitation so far as that taken singly goes (*n*), yet it will be seen that the second limitation in effect reduced the first limitation to a period but for their *joint* lives.

But as will be seen later, the mere use of the word "survivor", to whom a *life* interest in remainder is given, by no means always connotes contingency in regard to such remainder.

Now let us briefly discuss "joint tenancy for lives"—remembering the complete distinction between such a limitation and a limitation to two or more whether as joint tenants or as tenants in common during "their *joint* lives". As there could be a joint tenancy (*o*) of land or personal estate held in fee simple *pur autre vie* for a term of years or absolutely, so of course there can be a joint tenancy for lives (*p*) in real or personal estate. Each of such joint tenants for lives was seised or possessed of the whole and every part of the subject-matter during the whole of his life (*q*) or, perhaps more accurately, for the joint lives of the donees and the life of the survivor (*r*). A man could always have a valid vested life estate in himself, with an immediate vested remainder thereon for the life of another (*s*). Whichever was the exact position, each could only as against his fellow dispose *inter vivos* of or forfeit his proper proportionate share (*t*). And when the

(*m*) See article by the writer fully going into the history and authorities on the subject, 51 L. Q. R. 668.

(*n*) See *Re Legh*, [1938] 1 Ch., at p. 45.

(*o*) Litt., ss. 277, 280, 281, 282.

(*p*) Litt., s. 277, though owing to the 1925 Legislation such a tenancy in English real estate must now be equitable, not legal.

(*q*) Litt., ss. 277, 288; Co. Litt. 186 (a); Challis (2nd ed.), 335.

(*r*) See *per* the Serjeant in 3 Salk. 204, para. 1, and *Doe d. Dormer* v. *Wilson*, 4 B. & Ald. 303.

(*s*) Preston, Conv. III, 225, 166; Coke, 2nd Inst. 301 (5). A gift of a life estate to a man with remainder to him for the life of his heir is good: *Re Amos*, [1891] 3 Ch. 159, the latter during his life must be contingent, for *nemo est hæres viventis*.

(*t*) Co. Litt. 186 (a).

first to die died, without the joint tenancy having been severed, he dropped out and his seisin entirely determined, leaving his fellow to remain, as he had been before that death, seised or possessed of the whole and every part of the subject-matter for the whole of his life (*u*). His fellow did not at the death of the first to die first become seised *per tout*, *i.e.*, of the whole. If indeed he had become so first seised at his fellow's death, then there might well have been a contingency as regards, where there were two joint tenants, a moiety; but even so, as such contingency would have been an incident to the estate created by the law itself, it seems reasonable to suggest that it could not cause an offence to any other rule also invented by the law itself, *e.g.*, where applicable the modern rule of perpetuity.

But a joint tenancy for lives can be entirely extinguished either by a release of the interest of one to his fellow, where there are only two joint tenants, or as to the third part of one, where there are three, who grants to one only of his fellows (*v*), or by a severance of the joint tenancy by a grant by one of his share to an outsider.

Thus if one of two joint tenants for life releases all his interest to his fellow, his fellow will be able to hold against remainderman or reversioner for the whole of his, the releasee's, life, but no longer —in spite of the fact that the releasor may survive the releasee; and since one joint tenant can only release to his fellow, an express grant by the one to the other of all the grantor's estate and interest for the grantor's life will operate as a release to his fellow, with the same result (*x*).

If, however, there are three joint tenants for life, A, B and C, and A grants all his estate and interest to C only, then C will hold the one-third share which A could effectually as against his fellows dispose of as tenant in common, together with himself and B holding and continuing to hold as joint tenants the remaining two-thirds (*y*), with benefit as to such two-thirds of survivorship between the two. In the last case C or his personal representatives would hold the one-third share for the whole of A's life, but no longer, as against remainderman or reversioner whether or not A predeceases or survives either or both of B or C; for as to one-

(*u*) Litt., ss. 280, 281, 282, 287.

(*v*) *Eustace* v. *Scawen*, Croke Jac. 696; 2 Rolle Abr., p. 86, pl. 1, p. 403; L. pl. 3; Sir W. Jones, 55; *Harrison* v. *Belsey*, T. Raymond, 413; T. Jones, 136; Fearne, 338.

(*x*) *Eustace* v. *Scawen*, *supra*, and 2 Rolle Abr., p. 86, pl. 2; Prest. Shep. T., 205, 208.

(*y*) Litt., s. 304; *Chester* v. *Willans*, 2 Wms. Saunders, 96; the same *mutatis mutandis* applies if A grants his share to a stranger, X: Litt., s. 294; *Re Hewett*, [1894] 1 Ch. 362, at p. 368.

third there has been a severance of the joint tenancy, seeing that the grant was to one only of his two fellows, though as to the remaining two-thirds the joint tenancy remains as between B and C.

Where there is a joint tenancy for lives, and the joint tenancy is severed, then each former joint tenant cannot be any longer seised or possessed of the whole and every part of the subject-matter for his life; hence, if there are two such joint tenants and the jointure be severed, each is now seised only of a moiety for his life, and on the death of the one first dying the remainderman, if his remainder be vested, or the reversioner will be accelerated, by reason of the severance, on to the moiety of the one first dying (*z*).

But a release by one joint tenant to his fellow, or to *all* his fellows if there be more than one, does not operate as a severance, though his fellow as above noted can hold only for his own life, or his fellows if more than one can hold only as joint tenants only for their lives, notwithstanding that the releasor survives his fellow or all his fellows (*a*).

If there were a *legal* contingent remainder in land on a joint tenancy for lives, as, say, a limitation to A and B for their lives with remainder to the heirs of X, a living person, and A were to release all his interest to B, then at law, independent of the Contingent Remainders Act, 1877, and the 1925 legislation, the remainder would now have to vest during the subsistence of B's life estate or *eo instante* with his death, B's life estate being the only particular estate now left. That is, to be valid (while in English law legal contingent remainders could exist as legal estates) X must die before B's life estate was destroyed (*b*), or naturally expired (*c*), or *eo instante* with B's death; whereas but for such release, there would have been the two original particular estates, *i.e.*, for both A's and B's lives during which the contingent remainder might have duly vested (*d*). If, in the same case, the joint tenancy was severed, and X had survived A, the contingent remainder would have failed as to one moiety of the land, but had X predeceased B would have been good as to the other moiety (*e*).

All the joint tenants for life could always together convey by

(*z*) Litt., s. 301; Co. Litt. 191 (a); Challis (2nd ed.), 336; Preston, Abstract, II, 63; Preston, Conv., III, 408. See also *Lane* v. *Pannel*, cited below, and Fearne, pp. 310, 311, 338.

(*a*) Co. Litt. 193 (a); *Eustace* v. *Scawen*, Croke Jac. 696; 2 Rolle Abr., p. 86, pl. 1, p. 403, pl. 3; Sir W. Jones, 55; *Harrison* v. *Belsey*, T. Raymond, 413; T. Jones, 136; Fearne, 338.

(*b*) As to protection against destruction of the contingent remainder by forfeiture, surrender or merger, see Act of 1845, 8 & 9 Vict. c. 106, s. 8.

(*c*) See protection conferred by the Act of 1877.

(*d*) *Belsey* v. *Harrison*, T. Raymond, 413; T. Jones, 136; Fearne, 338.

(*e*) *Lane* v. *Pannel*, 1 Rolle Rep. 238, 316, 438, discussed by Fearne at pp. 65, 310, 311 and 338.

deed to a stranger a *vested* estate which would endure for the duration of the longest liver of the grantors (*f*). This must have been because each was seised as above indicated of the whole for the entirety of his life, or for the joint lives of the donees and the lives or life of the survivors or survivor of them, for a vested estate. Had each been seised of the whole only for the *joint* lives of the donees with a contingent remainder (*g*) to the survivors or survivor for their or his lives or life, then at law before the Act of 1845 (8 & 9 Vict. c. 106, s. 6), all together could by deed have conveyed to a stranger only an estate for the *joint* lives of the grantors (*h*). It follows from the foregoing considerations that if in the case of *Re Legh* (*i*) above stated—which the reader will remember was an appointment of personal estate to which the modern rule of perpetuity does apply—the appointment had been to A and B as joint tenants "for their lives", the appointment would have been free from objection (*k*).

As equity follows the law, it seems clear that if the legal fee were vested in trustees, upon trust in equity for A and B as joint tenants for their lives, with equitable remainders over, and if A and B were to sever their joint tenancy, the equitable remainderman would be accelerated on the death of the first of A and B to die on to his moiety—as above stated.

Now I conceive that if two joint tenants for lives wished to bar the survivorship between them, retaining the maximum possible benefit to themselves, they together should convey to trustees on trusts for themselves as tenants in common as next stated. Suppose them to have been legal joint tenants for lives of English real estate before the 1925 legislation. They should, I conceive, together convey the land to the use of trustees and their heirs during the lives and life of the grantors and survivor of them, nevertheless upon trust as to one moiety thereof for the one grantor and his heirs, and as to the other moiety for the other grantor and his heirs. As we have seen, they together could convey a vested estate for the whole duration of the life of the longer liver of them,

(*f*) Preston, Conveyancing, III, 407; *Doe* v. *Wilson*, 4 B. & Ald. 303, A.D. 1821; a case of surrender of copyholds by husband and wife tenants by entireties for their lives, held to pass vested estate for the duration of the life of the longer liver of the surrenderors. Tenants by entireties, like joint tenants, were seised *per tout*, but unlike joint tenants, could not sever. Challis (2nd ed.) 344, 345; *Crew* v. *King*, 2 Wm. Bl. 1211.

(*g*) As Sir W. Jones, p. 55, reports *Eustace* v. *Scawen* there are some words which suggest a certain amount of contingency; and this report was cited in *Doe* v. *Wilson*, *supra*, but in the much better report in Croke Jac. 696 and 2 Rolle Abr., pp. 86, 403, nothing about contingency occurs.

(*h*) Fearne, 366.

(*i*) [1938], 1 Ch. 39.

(*k*) *Re Roberts*, 19 Ch. D. 520; Gray, Perpetuities, s. 232 (a).

and this estate the trustees will obtain; there can be no possible acceleration of the remainderman on to a moiety; he can only come in to the whole on the expiration of the estate which the grantors had power to grant over and did grant over; but the deed creates *ab origine* a totally new equitable interest in the grantors, *viz.*, a tenancy in common for that period. It is not a severance of the old legal joint tenancy.

It is true that since 1925 the two could no longer have or grant over a *legal* estate for life in English real estate. By the 1925 legislation the legal fee would be vested in them as joint tenants and they would together constitute the tenant for life : S. L. Act, s. 19 (2).

They cannot, of course, sever a legal fee simple so as to create a legal tenancy in common : L. P. Act, s. 36 (2).

But we can see nothing whatever to prevent them together assigning over to a trustee their equitable interest for the duration of the life of the longer liver of the two upon trust for themselves as tenants in common (S. L. Act, s. 104) as before the Act they could have similarly conveyed over what was then their legal interest.

The result no doubt would be to bring into immediate operation the statutory trusts for sale, since they have now become by virtue of the deed in equity tenants in common (S. L. Act, s. 36); but each would be entitled to one moiety of the income of the proceeds of sale arising during the life of the longer liver of the two.

It must not be supposed because if property real or personal be given to or in trust for A and B for their joint lives with remainder in fee or absolutely to or for the "survivor" of them, in such case the remainder must be contingent (*l*), that this proves that in every case a remainder to the "survivor" *for his life* must necessarily be contingent and not a vested remainder. It has always been the policy of our law to hold where possible a remainder vested rather than contingent—the most general illustration of this is the rule, known as the rule in *Shelley's Case* abolished as to limitations created after 1925.

The fact that a legal contingent remainder in real estate failed at law unless it vested during the subsistence of or *eo instante* with the expiration of the particular estate of freehold or tail whereon it depended reinforced this rule. Accordingly from the earliest days the Courts wherever it was possible (*m*) have held words

(*l*) Fearne, 9; Co. Litt. 191 (a), note.
(*m*) Fearne, 241, 377; *White* v. *Summers*, [1908] 2 Ch., pp. 271 *et seq.*; Brooke, Done and Remainder (38).

prima facie contingent such as "if A shall die without issue to, etc.", as connoting only what is usually now expressed as "with remainder to"; and other words *prima facie* contingent as not involving real contingency.

"It sometimes happens that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them; or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession" (*n*). After these words Fearne gives various instances, and then at p. 243 thus gives the case of *Fortescue* v. *Abbot* (*o*)—it will be remembered that at this time a devise to B without further context passed to him only a life estate—as follows: "Again where a testator having four children devised one house to his eldest son and heir, without limiting any estate; and so devised three other houses to his other three children respectively, and willed that if either of his said children should depart this life, then the houses so given them should be equally divided betwixt them that are living; the eldest son died, and it was contended that this limitation over to the children then living was a contingent remainder to the survivors, depending on the particular estates for life in the children; and that the eldest son's estate for life, in the house devised to him, was merged in the fee which descended on him upon his father's decease; and consequently the contingent remainder to the survivors in this house was thereby destroyed (*p*).

"But on the other hand it was insisted, and so adjudged by the Court, that this was not a contingent remainder, but a vested remainder; and that every child took a particular estate in his or her house for life, with remainder to the others for their lives vested, agreeable to the resolutions in the above-cited cases of *Webb* v. *Hearing*, *King* v. *Rasdall* and *Chadock* v. *Cowley*. It is observable that this case is wrongly reported by Levinz, who says that he heard that the Court held it good as an executory devise. But both Pollexfen and Sir T. Jones, who argued the case, report the decision of the Court as above stated."

(*n*) Fearne, 240, 241.

(*o*) Poll. 479; Sir T. Jones, 79, A.D. 1676; Fearne, 243.

(*p*) It may here be remarked that even if the Court had held that the remainder was contingent, the descent of the reversion in fee from the father being simultaneous with the devise by the father of a life estate therein to his son and heir, would not have extinguished for good the contingent remainder, unless indeed the son had after the father's death done or suffered some further independent act to extinguish, *e.g.*, by conveying the immediate fee to a stranger. Unless he had done or suffered some such further independent act, the fee in the son would at his death have opened to let in the life estate of his surviving brothers and sisters. See Fearne, 341—343.

In this case it will be seen that each of the four children took a full life interest in his particular house; that the remaindermen were only to take for their respective lives and no longer; hence there was no real contingency involved in the use of the words "that are living"; it was a simple early case of vested cross-remainders for life, and in no conflict whatever with *Re Legh*, [1938] 1 Ch. 39.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 232.)

Law Society's Condition.

20.—(4) Where before the date of the contract a closing order or a demolition order or a clearance order under any Act relating to the housing of the working classes has been served upon the vendor in relation to the property, then, unless the vendor has before the said date given to the purchaser notice in writing of the order, the purchaser may by notice in writing to the vendor or his solicitors rescind the contract and thereupon the provisions of Condition 10 (2) shall apply as if the contract had been rescinded by the vendor under Condition 10 (1).

(5) In this condition the expression "local or public authority" includes any inspector acting under the Factory and Workshop Acts for the time being in force and any statuory company within the meaning of the Landlord and Tenant Act, 1927.

This condition deals only with closing orders, demolition orders and clearance orders under Acts relating to the housing of the working classes. Under the Housing Act, 1936, demolition and clearance orders may be made in respect of any houses occupied or "of a type suitable for occupation" by persons of the working classes; and closing orders may be made not only in relation to any part of a building which is occupied or is of a type suitable for occupation by persons of the working classes, but also in respect of any underground room, as defined in the Act.

It may be remarked that the Act contains no definition of "a person of the working classes" for the general purposes of the Act; but paragraph 11 (e) of the Eleventh Schedule (dealing with re-housing) provides that for the purposes of that Schedule the expression "working class" includes mechanics, artisans, labourers

and others working for wages, hawkers, costermongers, persons not working for wages but working at some trade or handicraft (without employing others except members of their own family), and persons other than domestic servants whose income in any case does not exceed an average of £3 a week, and the families of any such persons who may be residing with them.

Demolition orders.

Such orders may be made in relation to :—

(a) Any house which is occupied by or of a type suitable for occupation by persons of the working classes. The ground on which the order is made is that the house is unfit for human habitation. Such orders are only made where the local authority (as defined in the Act) has come to the conclusion that the house cannot, at a reasonable expense, be rendered fit for human habitation (section 11). In other cases the authority serves a notice requiring the execution of the necessary works (section 9), and may carry out the works if the owner fails to do so (section 10). Before a demolition order is made notice must be given to the owner, who is then given an opportunity of submitting a list of the works which he offers to carry out. The council may then, if it thinks fit, accept the undertaking of the owner or any mortgagee to carry out such works as are necessary to render the house fit for habitation; but failing this, or upon non-compliance with the undertaking, a demolition order is made (section 11).

(b) Obstructive buildings (section 54). This term is somewhat misleading as it has no connection with obstruction of road traffic or road visibility or physical obstruction. It means a building which by reason only of its contact with or proximity to other buildings is dangerous or injurious to health. In this case the order may be made either as to the whole building or any part of it, whereas in the case of houses dealt with under class (a) above an order can only be made in respect of the whole house.

Closing orders.

Such orders may be made under section 12 of the Housing Act, 1936, in relation to :—

(a) Any part of a building which is occupied by or is of a type suitable for occupation by persons of the working classes which is unfit for human habitation.

(b) Any underground room (regardless of the class of occupant

or the type of property) which is unfit for human habitation. The conditions which are deemed to render an underground room so unfit are specified in section 12 of the Act. Broadly speaking, " underground room " means a basement; and the section is aimed at the improvement of ventilation and lighting of such rooms, and the elimination of dampness, effluvia or exhalation.

The authority can take the like proceedings in relation to any such part of a building, or any underground room, as could be taken in respect of any house, except that where a demolition order would be made in respect of a house the appropriate order will be a closing order prohibiting the use of the part of the building, or the room, except for an approved purpose; but

(1) Such approval is not to be unreasonably withheld;

(2) The closing order is to be determined when the part of the building or the room has been made fit for human habitation.

Compare with the above provisions section 132 of the Public Health (London) Act, 1936, prohibiting the letting or separate occupation of underground rooms if such rooms do not comply with certain regulations as to height, windows, ventilation, lavatory accommodation, etc.

Clearance orders.

Under section 25 of the Housing Act, 1936, the local authority may declare an area to be a " clearance area " if satisfied upon two matters :—

(1) That the houses in that area are either (a) by reason of disrepair or sanitary defects unfit for human habitation; or (b) dangerous or injurious to the health of the inhabitants of the area (by reason of their bad arrangement or the narrowness or bad arrangement of the streets); and

(2) That the other buildings in the area are similarly dangerous or injurious to health; and

(3) That the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area (subject as next mentioned).

Where some of the buildings in a given area are fit for habitation or not dangerous or injurious to health the authority must so define the " clearance area " as to exclude from it (and accordingly from any clearance order subsequently made), any such buildings. Any clearance order passed by the authority following upon a resolution declaring an area to be a " clearance area " must be confirmed by

the Minister of Health (see Third Schedule, paras. 4—6). Although the clearance area may properly include houses or other buildings to which the only objection is that by reason of their bad arrangement in relation to other buildings, or the narrowness or bad arrangement of the streets, they are dangerous or injurious (as above mentioned in 1 (b)), these houses or buildings must not be included in the demolition order. The authority has power to purchase such properties under section 25 (3) in order to effect the demolition itself.

It will be seen that in all these cases the result is either to destroy physically the subject-matter of the contract or partially or wholly to sterilise the property. It therefore seems reasonable to provide, as in the Law Society's Condition 20 (4) above, that if a closing order, demolition order or clearance order has been made and served upon the vendor before the contract date the purchaser may rescind the contract unless he had notice prior to the contract of such order. It does, however, seem doubtful whether the vendor should only be entitled to hold the purchaser to the contract if he can show that he, the vendor, gave written notice to the purchaser of the order. We may put aside the question whether proof of verbal notice should be sufficient, upon the ground that the requirement of writing may be defended on the same ground as the statutory provision in the Statute of Frauds, repeated in the Law of Property Act, 1925, requiring a contract of sale to be in writing. Possibly such a provision may tend to reduce litigation. It is, however, well known that many purchasers' solicitors now make the official local land charge searches prior to contract, and deliver with it general inquiries as to sanitary and other notices and orders affecting the property. It is therefore by no means unlikely that the purchaser will receive, prior to contract, written notice from the authority of any closing order, demolition order or clearance order affecting the property. Where the vendor can establish that such written notice has been received by the purchaser, it would hardly seem reasonable or necessary to allow the purchaser to rescind the contract, unless he can show that he had good reason to suppose that the vendor would obtain the annulment of the order. He could hardly have such reason unless the vendor, as part of the terms of the contract, had agreed to take specified steps. In any case the condition, as it stands, indicates that the purchaser is to complete the purchase if he has written notice from the vendor of the order, and it would seem to be logical to put written notice from the authority on a similar footing. In neither case is the purchaser deceived; for he has embarked upon the contract with express written notice of an order. The

requirement of express written notice by the vendor is no doubt made in this Condition because it is felt that a vendor should not be entitled to enforce a contract for the purchase of land subject to such a material matter unless he has either referred to the order in the contract or at least given written notice of it to the purchaser. On the other hand, what merit is there in the conduct of a purchaser who, with knowledge of such an order, embarks upon a contract of purchase with the intention of repudiating the contract at a later date if he finds it convenient to do so? Clause 20 (1) seems to have no bearing upon this point, except that it renders the vendor liable to pay any sum payable in consequence of any requirement of the authority, *e.g.*, as to demolition.

As the purchaser will have no remedy in respect of any closing order, demolition order or clearance order made after the date of the contract, it would seem that any intending purchaser of a working class house, or of any house having a basement, should inquire of the Medical Officer of the local authority whether the property complies with the conditions laid down in the Housing Act, 1936, in respect of fitness for habitation. As to any underground room which is let or proposed to be let by the purchaser it will be desirable to make specific inquiry, in view of the provisions of the Housing Act, 1936, s. 12 (see *Closing Orders*, above).

It is also desirable in such cases to inquire of the Medical Officer before contract as to the number of persons permitted to reside in the house, or (if let or intended to be let in parts) in the various parts thereof. It is an offence (punishable by fine) for an occupier or owner to cause or permit overcrowding (Housing Act, ss. 58 and 59). The owner is only guilty of an offence if—

(1) After written notice he fails to take any steps reasonably open to him for securing the abatement of the overcrowding, including proceedings for obtaining possession of the house.

(2) When letting the house the landlord or his agent either had reasonable cause to believe that it would become illegally overcrowded or failed to make inquiries of the proposed occupier as to the number, age and sex of persons who would be allowed to sleep in the house.

Reference should be made to sections 57—70 of the Housing Act, 1936, for the material provisions dealing with overcrowding. The "appointed day" referred to in these sections is to be ascertained as specified in section 68.

In the absence of full information a purchaser of a working class house should endeavour to obtain :—

(i) A warranty that the property conforms to the requirements of the Housing Act, 1936, as to fitness for habitation and is not " overcrowded " within the meaning of that Act, and

(ii) The right to rescind the contract and to recover his deposit and the expenses incurred by him in relation to the contract and investigation of the title in the event of the vendor not making good his warranty.

In the case of basement houses, of whatever class, a similar warranty would be suitable; but the warranty should be limited to the basement portion of the house.

Law Society's Condition.

TENANCIES.

21.—(1) Where the property is sold subject to leases or tenancies the counterparts of the leases or agreements (if in writing) or abstracts or copies thereof may be inspected by the purchaser at the office of the vendor's solicitors, for a period of seven days next preceding the day of sale, and in the sale room at the time of sale, and the purchaser (whether he makes such inspection or not) shall be deemed to have notice of, and shall take subject to, the terms of all the existing leases or tenancies, and such notice shall not be affected by any partial, incomplete or inaccurate statement in the contract, with reference thereto. No objection shall be made on account of the absence of any agreement in writing with any tenant, and in any such case the purchaser shall be satisfied with such evidence of the nature of the tenancy as the vendor may be able to supply.

(2) No objection shall be made, by reason of the agreements or covenants by the tenant, in any tenancy agreement or underlease, not corresponding with the covenants by the lessee in the lease under which the property (if leasehold) is held, unless the discrepancy is such as to give rise to a forfeiture of the lease.

(3) Where a tenancy or lease affects more than one lot, or affects other property besides the property sold, a purchaser shall take his conveyance with the benefit of the apportioned rent stated in the contract, or (if not so stated) settled by the vendor or his agent before the date fixed for completion, and he shall not require the assent of any tenant thereto, or otherwise require the rent to be legally apportioned.

Condition 21 (1).

This condition applies only where the property is sold subject to leases or tenancies, and therefore does not apply where the particulars and special conditions are silent. Apart from express particulars of tenancies the purchaser may be unable to insist on vacant possession if he has notice in the particulars that the property is "in the occupation of" a third party: *Lake* v. *Dean*, 28 Beav. 607. See generally, *The Conveyancer*, Vol. I, pp. 26—28, and the cases there cited, and *Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch. D. 390. It must not be supposed that a general statement that the property is "in the occupation" of a third party will cover lengthy tenancies. Thus, such a description was held not to cover a lease of which the unexpired term was about eight years: *Caballero* v. *Henty* (1874), L. R. 9 Ch. 447.

Before dealing with the exact effect of this Condition it may be pointed out that "if the parties do not choose to look at documents placed before them to which they are referred they cannot complain that they have not a perfect knowledge of the nature of the interest with which they are dealing": *Dawes* v. *Betts* (1848), 12 Jur. 709. Where a deed is referred to and it is made clear that it can be inspected before exchange of contracts, the purchaser will normally be bound by the contents of the deed: *Cox* v. *Coventon* (1862), 31 Beav. 378. It must, however, be made clear that the document can be inspected: mere mention of the document without indicating the nature of its contents is generally insufficient: *Reeve* v. *Berridge* (1888), 20 Q. B. D. 523; *Re White and Smith*, [1896] 1 Ch. 637; *Cox* v. *Coventon*, *supra*. In *Hall* v. *Smith* (1807), 14 Ves. 426, Grant, M.R., observed that notice that the property was let gave notice to the purchaser of everything contained in the lease; but this statement appears to be in conflict with later decisions, particularly *Reeve* v. *Berridge*, *supra*; *Re Haedicke and Lipski*, [1901] 2 Ch. 666. Even if the property is sold subject to specified leases or tenancy agreements, copies of which are supplied to the purchaser, this may not exhaust the vendor's obligations. Thus, if the tenant has given notice of intention to quit, the vendor should disclose this fact, for the purchaser may not wish to be left without a tenant if he is purchasing for investment purposes only: *Dimmock* v. *Hallett* (1866), L. R. 2 Ch. 21. It seems that the question whether such disclosure will entitle the purchaser to rescind depends upon the circumstances in each case, and that failure to disclose a notice to quit in respect of a trivial part of the land or property purchased will probably not enable the purchaser to recede from the contract: this appears to be a reasonable deduction from the authorities.

In the case of *Davenport* v. *Charsley* (1886), 54 L. T. 372, where formal notice had not been given, but the vendor did not disclose the fact that the tenant had intimated by letter that he was proposing to give up his tenancy at the end of the year, it was held that the vendor was not under an obligation to disclose the letter. The distinction is a fine one, and if the holding had been of the major portion of the property purchased the decision might have been different. Condition 21 (1), regarding facilities for inspection of the leases or agreements "for a period of seven days next preceding the day of sale", does not appear to fit in with the normal practice in the case of a sale *by private treaty*. "Next preceding the day of sale" probably means "next preceding the date of the contract". This is not absolutely clear, as the definition in Condition 33 states that in a sale by private treaty references to the "date of sale" (not "day of sale") shall be construed as references to the date of the contract. It may be doubted whether in such cases the vendor can derive any advantage from such a general condition unless an actual opportunity for inspection is in fact given during the seven days preceding the date of the contract, and possibly it is not intended that he should do so.

If the contract is to be specifically enforceable against the purchaser, the purchaser of a leasehold property must be given full opportunity in fact to inspect the lease sold (cf. *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487; *Re Haedicke and Lipski*, [1901] 2 Ch. 666); and in the absence of full disclosure or notice of any unusual or onerous conditions the contract cannot stand : *ibid.*; and see *Charles Hunt, Ltd.* v. *Palmer*, [1931] 2 Ch. 287 (where the particulars were misleading). This case has already been mentioned : *The Conveyancer*, Vol. I, p. 310. Similarly, the purchaser was allowed to rescind and recover his deposit with interest where the lease was said to be in "ordinary form" and there was in fact a covenant to pay surveyors' fees in relation to any dilapidation notice : *Allen* v. *Smith*, [1924] 2 Ch. 308. It may, therefore, be assumed with some confidence that (unless a sufficient opportunity to inspect the lease is given to the purchaser) the Court will follow a similar line with regard to any lease or tenancy agreement subject to which the property is sold if it imposes on the vendor as lessor obligations of an unusual or onerous nature not disclosed in the particulars or conditions of sale. See *Phillips* v. *Miller* (1875), L. R. 10 C. P. 420 (unusual right of tenant contrary to local custom); *Brandling* v. *Palmer* (1854), 2 Drew. 427 (tenant occupying rent free); *Lowndes* v. *Lane* (1789), 2 Cox 363 (material facts omitted); *Milligan* v. *Cooke* (1808), 16 Ves. 1 (tenant's covenant for renewal only personal); *Flint* v. *Woodin* (1852),

9 Ha. 618 (position as to repairing covenants not truly stated); *Lachlan* v. *Reynolds* (1853), 23 L. J. Ch. 8 (misrepresentation as to rent).

The question whether a sufficient opportunity has been given of inspecting the lease or tenancy agreement is one of fact in each case: *Re White and Smith*, [1896] 1 Ch. 637; *Dougherty* v. *Oates* (1900), 45 S. J. 119; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487. Compare with the decision of *Midgley* v. *Smith*, [1893] W. N. 120, the *dicta* in *Re White and Smith* (*supra*). These *dicta* suggest that knowledge of similar leases of neighbouring property may fix a purchaser with notice; *sed quære.*

Agricultural holdings.

As to what is an agricultural holding see the definition in the Agricultural Holdings Act, 1923, s. 57; but note the particular modifications of this definition in sections 12, 13, and 33.

If the land sold is agricultural and is sold subject to a tenancy the following points should be noted :—

(a) Section 25 of the Agricultural Holdings Act, 1923, provides that in the case of a yearly tenancy (which includes a tenancy for a longer period : *Edell* v. *Dulieu*, [1924] A. C. 38), neither party can determine the tenancy by a notice to quit expiring less than one year after the expiry of the then current year of the tenancy. It has been held that the section applies to a notice given by the tenant as well as a notice by the landlord : *Flather* v. *Hood* (1928), 44 T. L. R. 698. This provision applies notwithstanding anything in the contract of tenancy. The section does not apply in certain specified cases, perhaps the most important of which is where the notice is given under a provision in the lease or tenancy agreement authorising the resumption of the holding for any specified purpose except the use of the land for agriculture.

(b) Section 23 of the same Act provides that if the tenancy is for a term of two years or upwards, the tenancy will not terminate on the expiry of the term unless not more than two years nor less than one year before the expiry of the term written notice to terminate the tenancy has been given by either party. Otherwise the tenancy continues, after the expiry of the term, from year to year. The section only applies to tenancies granted or agreed to be granted on or after January 1, 1921. If it applies, no " agreement to the contrary " is valid : section 23 (4). Consequently it has been suggested that as, failing notice in conformity

with the section, the tenancy "shall not" terminate at the end of the term, an agreement to surrender the tenancy on or before the expiry of the term would be unenforceable. The answer may be that the section is confined to the automatic effect of the grant of the tenancy and the negation of the right of the landlord to insert in the lease or tenancy agreement a provision negativing the section, thus leaving the tenant free to agree to assign his interest to any other person or to agree to surrender it to the landlord. Until this point is judicially determined it would, however, seem safer for the landlord, in such cases, to arrange for a nominee to agree to take an assignment of the tenancy.

(c) If notice to quit has been given to the tenant of an agricultural holding the notice will normally be invalidated by any contract for sale entered into by the person by whom the notice to quit was given during the currency of the notice (Agricultural Holdings Act, 1923, s. 26). It is therefore very important for the purchaser of agricultural land subject to tenancies to bear in mind the effect of this provision. Thus, if the purchaser desires possession as soon as is practicable and the property is sold subject to a yearly tenancy, the contract stating that notice to quit has been given, such notice expiring very shortly after the day fixed for completion, such notice will become void on exchange of contracts. Moreover, if there is substantial delay in completion, owing to unforeseen circumstances, the purchaser may lose the opportunity of serving a new notice expiring a little more than one year after completion, and may therefore have to wait nearly two years for possession. In such cases it may be desirable to provide in the conditions of sale that the vendor shall forthwith after exchange of contracts serve a new notice to quit. There appears to be nothing in section 26 which prevents this. Further, the section provides that the notice is valid if *prior* to the contract the tenant by writing agrees that the notice shall be valid. The foregoing observations are subject to any provision in the lease or tenancy agreement by which the tenant agrees that any notice so given shall remain valid notwithstanding the sale of the holding or any part thereof. Such an agreement by the tenant is not unusual and would appear to be valid.

In *Rigby* v. *Waugh's Executors* (1931), 100 L. J.

K. B. 259, the landlords on giving the notice advised the tenant of the proposed sale. The tenant before the contract was concluded wrote to the landlords stating that he would give up possession according to the notice. This letter was held to constitute an agreement that the notice to quit should be valid. The case of *Robinson* v. *Nesbitt* (1920), 64 S. J. 291, decided under the earlier Agricultural Land Sales, etc., Act, 1919 (which did not state that the notice was only avoided if the notice was given and the contract for sale made by the same person) is overruled by section 26 of the Act of 1923. Under the Act of 1919 the extraordinary result was produced that if after contract the vendor served notice to quit the holding and the purchaser then sub-sold the whole or a part of the land the notice became void. The Act of 1923 has corrected this anomaly, and it would now seem that nothing which a purchaser of part of the land can do will invalidate a notice served by the vendor after contract. In the case of *Rochester, etc., Sewerage Board* v. *Clinch*, [1925] Ch. 753, A, the owner of a certain property subject to a yearly tenancy in favour of X, sold and conveyed part of it to B subject to the tenancy. A died, and X paid the whole rent to his executors. A's executors and B on October 10, 1923, gave to X a joint notice to quit the holding on October 11, 1924. During the currency of this notice A's executors agreed to sell to X the remainder of the property, and it was in fact conveyed to X after the expiry of the notice to quit. X refused to give possession to B, pursuant to the notice, of the part purchased by B on the ground that the agreement for sale to X of the other part of the holding invalidated the notice. It was, however, held that the notice (not being given only by A's executors) remained in force as to B's part of the property. It will be seen that if after actual completion of the purchase of a part of an agricultural holding any notice served by the purchaser was liable to be avoided by the sale of any other part of the holding—even many years afterwards—his position would be intolerable.

The following illustrations in connection with notices to quit agricultural holdings may be useful :—

(1) The lessor gives notice to quit the holding, and during the currency of the notice agrees to sell the holding or part of it. The notice becomes void, unless the tenant has agreed

in writing before the contract for sale that the notice shall be valid: Agricultural Holdings Act, 1923, s. 26 (1). This provision applies even if the tenant is the purchaser of the part: *Blay* v. *Dadswell*, [1922] 1 K. B. 632.

(2) The lessor agrees to sell part of the holding to A. He then gives the tenant notice to quit the entire holding and during the currency of the notice sells the rest of the holding to the tenant. The notice becomes void: *Blay* v. *Dadswell* (*supra*).

(3) If the lessor sells and conveys part of the holding to the tenant or to any third party, and then gives the tenant notice to quit the remainder of the holding, the notice is good. The tenant, by written notice given within twenty-eight days after service of the notice, may elect to accept the notice as a notice to quit the entire holding: Law of Property Act, 1925, s. 140 (2), as read with Law of Property (Amendment) Act, 1926, s. 2.

(4) If the lessor agrees to sell part of the holding a notice given by him (before severance of the reversion by actual conveyance of the part sold) to quit only the part sold or the part retained will be void at common law: *Re Bebington*, [1921] 1 Ch. 559, following *Doe* d. *Rodd* v. *Archer* (1811), 14 East 245, and *Prince* v. *Evans* (1874), 29 L. T. 835.

See, further, as to notices to quit, the observations below dealing with Condition 21 (3).

Misstatements and errors.

There is no distinction in principle between the effect of a condition precluding objections or negativing the right to compensation in respect of misstatements regarding tenancies and a similar condition in respect of other misstatements. It should therefore be observed that the remarks to be made when dealing with misdescription and compensation (Condition 31) apply with equal force to the section of Condition 21 which deals with misstatements concerning leases or tenancies.

It seems convenient, however, to mention again the important case of *Curtis* v. *French*, [1929] 1 Ch. 252 (see *The Conveyancer*, Vol. I, p. 306). In that case the National Conditions of Sale applied. Clause 10 of those conditions stated that no error, misstatement or omission in the particulars should annul the sale, and that no compensation should be allowed by either party in respect thereof. The particulars of sale stated that the tenant's notice to quit had expired, but he had remained as a tenant by sufferance, and that the property was sold with vacant possession on completion.

There was in fact in occupation a person who claimed to be a sub-tenant entitled to a statutory tenancy under the Rent Acts. No steps were taken to challenge this claim. The purchaser sued the vendor for breach of the contract to give vacant possession. It appeared that he could have sold at a profit if vacant possession had been available and his claim was therefore for substantial damages. It was held that Condition 10 precluding compensation in respect of errors was an effective answer to this claim. This decision was criticised by the late Mr. Cyprian Williams upon the ground that the promise of vacant possession was an overriding undertaking, and that substantial damages should have been awarded accordingly: 66 L. J. 339. It is true that a statement in the particulars that vacant possession will be given is inconsistent with a general condition that the property is sold subject to all tenancies, and the vendor could clearly not have enforced specific performance subject to the protected tenancy. On the other hand it is well established by *Flureau* v. *Thornhill* (1776), 2 W. Black. 1078, *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158, and a long line of modern cases that substantial damages cannot be recovered where the vendor without fraud, or conduct amounting to fraud, is unable to make a good title. This rule holds even if the vendor mistakenly represents that he has a good title: *Bain* v. *Fothergill* (*supra*). (And see *The Conveyancer*, Vol. I, p. 306.)

Turning again to the effect of Condition 21 (1) of the Law Society's Condition it should be observed that under Condition 31 compensation is to be made in respect of *any* misstatement, and misstatements in respect of leases or tenancies are not excluded. Therefore Condition 21 (1), *if* intended to prevent the purchaser from claiming compensation by fixing him with notice of the true facts, appears to fall short of this object. It will also be seen from Condition 31 (4) that nothing "in these Conditions" (*i.e.*, in any of the Law Society's Conditions of Sale) compels the purchaser to accept property differing substantially from the property agreed to be purchased, or affects the right of the purchaser to rescind where compensation for a claim attributable to a material error, omission or misstatement cannot be assessed. It thus becomes clear that the apparent effect of Condition 21 (1) is substantially modified by Condition 31—no doubt intentionally.

Condition 21 (2).

This Condition provides in effect that where the property sold is of leasehold tenure and is subject to an underlease or tenancy agreement, no objection is to be taken by the purchaser if the obligations of the under-tenant do not correspond with those of the

vendor under the lease which is being sold unless the discrepancy is such as to give rise to a forfeiture of the lease.

Thus, if the lease contains a covenant by the lessee to use the property only as a grocer's shop, and there is either no limitation in the underlease of the user to which the property is to be put or permission is given thereby to the underlessee to use the premises for a purpose other than that of a grocer's shop, this may give rise to a forfeiture, and it is suggested that the Condition will not assist the vendor in such a case.

Condition 21 (3).

This Condition deals with two classes of case :

(1) Where the auction sale comprises more than one lot and the particular property sold is subject to a lease or tenancy agreement affecting not only the property sold but also another lot or other lots.

(2) Where the property is sold subject to a lease or tenancy agreement affecting not only the land sold but also other land, whether the sale is by auction or not, and in the case of a sale by auction, whether the other land is comprised in the auction sale or not.

The principle in either case is the same. If the contract specifies the rent which is to be apportioned in respect of the land sold the purchaser must accept an informal apportionment on that basis in the assurance to him of the property. If the apportioned rent is not so specified the vendor is authorised by this Condition to fix it before the date fixed for completion. In neither case can the purchaser call for the consent of the tenant or a legal apportionment of the rent. As to apportionment under section 20 of the Landlord and Tenant Act, 1927, see *The Conveyancer*, Vol. 2, p. 51.

Under section 140 of the Law of Property Act, 1925, upon the conveyance of part only of the land comprised in a lease, *i.e.*, on the severance of the reversion, not only are rights of re-entry and other conditions automatically apportioned to the respective severed parts of the reversion (section 140 (1)), but the grantee of any part is given the right to serve notice to quit in respect of such part under the same conditions as the owner of the reversion of the whole of the land might have served notice in respect of the whole of the holding (section 140 (2)). If such a notice is given the lessee may, however, by counter-notice, given within one month, determine the lease of the whole of the land at the same time as the expiring of the notice relating to the part (*ibid.*).

Prior to the Law of Property Act, 1925, all the owners of the

severed parts of the reversion had to combine to give notice to the tenant in such cases: *Re Bebington*, [1921] 1 Ch. 559. In *Smith* v. *Kinsey* (1936), 3 All E. R. 73; 82 L. J. 279, it was held by the Court of Appeal that a notice given only by the owner of the severed part was valid under section 140 of the Act of 1925. (See also the observations above in relation to Condition 21 (1).)

Agricultural holdings.

Section 2 of the Law of Property (Amendment) Act, 1926, imports a proviso which is confined to agricultural holdings. The tenant on whom notice to quit is served by a person entitled to a severed part of the reversion may within twenty-eight days of the service of the notice serve on all the reversioners notice accepting the notice to quit as a notice in respect of the entire holding taking effect at the same time as the original notice. If the tenant takes this course his acceptance has effect as if it were the acceptance of a notice to quit to which section 12 (7) (d) of the Agricultural Holdings Act, 1923, applies. Thus the tenant's right to compensation on determination of the tenancy is preserved in such cases. (See also the notes on agricultural holdings under Condition 21 (1) above.)

Law Society's Condition.

RENT RESTRICTION, AGRICULTURAL HOLDINGS AND LANDLORD AND TENANT ACTS.

22.—(1) As regards any dwelling-house which is or has been affected by the Rent and Mortgage Restrictions Acts, 1920 to 1933, or any of those Acts, the vendor shall upon the request in writing of the purchaser supply him with such information (if any) as may be in the vendor's possession in relation to compliance with any obligation imposed by any of the said Acts and affecting the dwelling-house. Subject as may appear in such information (if any) the purchaser shall assume without evidence that every notice, claim, application or proceeding required by any such Act to be given, made or taken in relation to the dwelling-house has been duly given, made or taken and that the rent appearing to be payable in respect of the dwelling-house at the date of the contract is lawfully payable and recoverable, and that all the requirements of any such Act in relation to the dwelling-house or to any tenancy thereof or to the rent thereof have been duly observed and performed.

(2) The vendor shall keep the purchaser indemnified against

all claims for compensation (a) for improvements or disturbance under the Agricultural Holdings Act, 1923, or (b) for improvements or goodwill under the Landlord and Tenant Act, 1927, or (c) in respect of any other matter under either of the said Acts or any other Act, or by custom, agreement or otherwise in respect of any tenancy which expires or is otherwise determined on or before the date fixed for completion. Save as aforesaid the purchaser shall keep the vendor indemnified against all such claims.

(3) After accepting the title, the purchaser of an entire agricultural holding may (subject to agreeing to keep the vendor indemnified from all claims by the tenant consequential on the notice) in writing require the vendor to serve any notice to quit or other notice affecting the property which would be valid under the said Act of 1923 or any statutory modifications thereof.

Condition 22 (1).

Where the property is sold with vacant possession and is subject to a tenancy protected under the Rent Acts it must be noted that no undertaking by the tenant to vacate can safely be relied upon. The Court *can* make an order for possession without proof of suitable alternative accommodation if considered reasonable where (*inter alia*) the tenant has given notice to quit and in consequence thereof the landlord has agreed to sell or let the house or has taken other steps as a result of which he would be seriously prejudiced if he could not obtain possession: Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and First Schedule. No agreement to vacate will be enforceable, and as to any case in which notice to quit has been given by the tenant, the making of the order for possession depends upon whether the Court considers it reasonable to do so, quite apart from the fact that it is improbable that the tenant will be in a position to meet the costs of any litigation. Under paragraph 1 of this Condition the purchaser is debarred from calling for evidence that the requisite steps under the Rent Acts have been taken so as to enable the vendor lawfully to recover the rent which is stated in the contract to be payable. It will be remembered that under the Rent Acts any authorised increase of rent is liable to suspension if the tenant obtains a certificate from the sanitary authority or satisfies the Court that the premises are not in all respects reasonably fit for human habitation or not in reasonable repair. This is a risk necessarily incident to the purchase of such

property, and under this Condition, as read with Condition 17, which requires the purchaser to take the property "as it stands", the purchaser could not resist specific performance unless he could establish that such a certificate of the sanitary authority had been served on the vendor, or that an order had been made suspending the increase, or that proceedings had been taken in which the suspension of the increase had been claimed by the tenant, or that in some other respect the statement as to the rent actually payable was to the vendor's knowledge incorrect or of doubtful accuracy.

The risk above indicated may result in unexpected loss to the purchaser. Whilst it is impossible here to deal suitably with the Rent Acts the following may be mentioned as additional risks involving possible loss to the purchaser :—

(a) If any notices given to the tenant are invalid, or requisite notices have not been served, the purchaser may suffer loss not only in respect of arrears taken over, but also in respect of rent becoming due between the date of completion and the date when a valid corrective notice is served; but see Rent and Mortgage Interest Restrictions Act, 1923, s. 6, as to the power of the Court to amend notices on terms considered just as respects arrears or otherwise.

(2) It may prove that the rent actually being paid cannot be supported because the amount of the increase is in excess of that permitted by the Rent Acts. Again, the rent payable in respect of a part of a house separately let may not have been legally apportioned. The rent which has hitherto been collected in respect of that part may not be considered (upon an application by the tenant to the county court for apportionment) to be justifiable. In either case the purchaser will suffer a loss of income for an uncertain period.

(3) Apart from the statutory position as to repairs, the purchaser may suffer loss by reason of the neglect of the previous owner to comply with express repairing obligations contained in a lease or tenancy agreement by virtue of which the tenant is holding over and which accordingly (like the tenant's obligations as to other matters) remain applicable to the controlled tenancy. See, *e.g.*, *Hewitt* v. *Rowlands* (1924), 93 L. J. K. B. 1080; but compare *John Waterer, etc., Ltd.* v. *Huggins* (1931), 47 T. L. R. 305, which makes it clear that where a closing order is made owing to the unfitness of the property for habitation (after a long period of occupation by the tenant) it must be

considered whether the tenant could reasonably have expected security of tenure for any lengthy period. In this case the tenant had received one week's notice to vacate the premises and was awarded no damages.

The following points are also material in connection with contracts for sale of properties subject to tenancies which are or may be controlled.

Before the passing of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the Rent Acts applied where either the standard rent or the rateable value was not more than £105 in London, or in the country £78. The position was substantially changed by the Act of 1933. This Act distinguished between three classes of houses, which are now generally referred to as Classes A, B and C. Where houses are referred to it will be appreciated that this term includes a part of a house (separately let).

Position under the Act of 1933.

(1) *Class A.*

To come within this class *both* the recoverable rent and the rateable value must be as follows. If the house is in the City of London or the Metropolitan Police District—exceeding £45 on April 6, 1931. If the house is elsewhere—exceeding £35 on April 1, 1931 (Act of 1933, s. 16).

The decontrol of houses of this class took effect on September 29, 1933 (section 1 (2)); but if notice has not been served on the tenant under section 1 (4) one month's notice requiring possession is necessary under that sub-section. See also section 1 (6), which affords to the tenant the benefit of the Landlord and Tenant Act, 1927, in respect of possible claims for compensation or a new lease as if he had been tenant under a lease or tenancy agreement and not merely a statutory tenant.

(2) *Class B.*

In order that a house should fall within this class two conditions must be fulfilled :—

(i) It must not be within Class A;

(ii) The rateable value must exceed the following limits :—In London £20 on April 6, 1931; elsewhere in England £13 on April 1, 1931.

This class of house remains subject to the previous Rent Acts. *E.g.*, it will be freed from control if the landlord obtains physical vacant possession (Act of 1923, s. 2 (1)). Again, the grant of a lease or agreement for tenancy for a term of two years (expiring not earlier than a specified date) will also effect decontrol (Act of

1923, s. 2 (2)). On this point note that there is no limit to the rent to be reserved in such cases, and the power of the tenant to determine the tenancy at an earlier date does not prevent decontrol from taking effect (*Quinlan* v. *Avis* (1933), 175 L. T. 287).

(3) *Class C.*

This class consists of houses of the rateable values following: In London—not exceeding £20 on April 6, 1931; elsewhere in England—not exceeding £13 on April 1, 1931. In other words it consists of all houses below the limits of Class B houses.

It is not possible to set out here all the material points and the provisoes in connection with separate parts and sub-lettings. Reference should be made to the Act of 1933. Generally speaking the policy of the Act is to preserve from decontrol such houses. Not only are the sitting tenant's statutory rights preserved but such houses if not already decontrolled could not and cannot be decontrolled after the passing of the Act of 1933, *i.e.*, July 18, 1933. Under that Act it was necessary for the landlord to obtain from the local authority a certificate of registration of the house as being controlled not later than October 18, 1933. Failing such certificate the house will be deemed, in any proceedings, to remain controlled. The county court has discretionary power even at the present time to sanction late registration, and if this power is exercised the certificate takes effect so as to decontrol the house from the date of application for registration (following the order of the county court), the only detriment to the landlord being that the property will be deemed to have been subject to control meanwhile (*Pearman* v. *Dyer*, [1935] 2 K. B. 149; *Stokes* v. *Little*, [1935] 1 K. B. 182). If, however, a Class C house is actually in the occupation of the owner at the date of the Rent Act of 1933 that Act did not operate to recontrol it (*Brooks* v. *Brimecome*, [1937] 2 All E. R. 637). It should be remembered that houses built after April 30, 1919, are not protected by the Rent Acts.

Position under the Act of 1938.

For the provisions of this Act (which did not all come into force at once) see the article by Mr. Blundell on pp. 361—370, *post*.

Where property is purchased subject to a tenancy or tenancies which may be controlled the following rather numerous inquiries appear to be appropriate in order to determine the true position and the recoverable rent. It would seem most desirable to make such inquiries before contract, particularly where the usual stringent condition is inserted precluding inquiries and objections regarding

any lack of proof that the rent which is being collected is legally recoverable.

Inquiries as to tenancies.

1. Copies of any tenancy agreements and leases under which tenants are holding or holding over should be supplied.

2. As to any verbal tenancy please state—

(i) when it commenced and what it comprises;

(ii) what period of notice to quit is requisite, on what date the notice must expire and how that date is ascertained.

3. Please supply copies of any notices to quit or of proposed improvements or claims for compensation served by any tenant.

4. Please furnish full names of tenants and the exact parts occupied by them, and the like particulars as to sub-tenants.

5. Please state—

(a) whether the rents are payable in advance;

(b) the day of the week, month or quarter on which the rents are paid;

(c) if any claim has been made by any tenant whether for compensation, return of excess rent paid or otherwise, or if the vendor has knowledge of anything which may give rise to any such claim.

6. Do the Rent Restriction Acts apply to the property or any part or parts thereof? If so:

(a) What is the standard rent of the property and/or of each such part?

(b) How is such standard rent established?

(c) Please furnish copies of all notices to quit and of increase served by the landlord.

7. If it is claimed that the Rent Restriction Acts do not apply to the property, how and when did the property become decontrolled?

8. As to the whole of the property or any part thereof which is occupied, please state the amount of the recoverable rent and the rateable value in April, 1931, and the amount of the present rateable value.

9. How is it established that such rent is the recoverable rent?

10. (i) Has the property or any part thereof been registered under the Rent Act of 1933 or 1938 as decontrolled? If so:

(a) Please furnish copies of any application for registration.

(b) Please furnish copies of any certificates issued.

(ii) If not, it must be so registered before completion.

11. Was the property built or converted into flats after April 1, 1919? If so, what evidence to that effect is available?

Condition 22 (2).

COMPENSATION.

(a) *Agricultural Holdings.*—The effect of Condition 22 (2) is that even if the property is sold subject to an existing tenancy or lease the vendor will be responsible for the payment of all compensation payable to the agricultural tenant under the Act if the tenancy determines by notice or otherwise before the date fixed for completion. If the vendor has given notice long before the date of the contract, it might very possibly be thought that the sale of the land subject to the tenancy would be sufficient to discharge the vendor from any obligation to pay compensation to the tenant except in so far as the same had become payable by the vendor before the date of the contract. Upon consideration, however, it will be appreciated that in general the obligation of the vendor is to discharge all outgoings in respect of the property up to the date fixed for completion. This Condition and also Condition 12 (3) of the National Conditions of Sale (13th edition), which is similar, are therefore strictly logical. If the vendor's notice to quit expires even one day after the date fixed for completion the purchaser will be liable to pay the compensation and no apportionment will be made, as apportionment can only apply to outgoings payable in respect of a period of time. If the payment is merely in respect of some particular event it is, of course, an outgoing but not an apportionable one. Compare the observations in *Midgley* v. *Coppock* (1879), 4 Ex. D. 309 (dealing with paving charges).

As to compensation for improvements see Agricultural Holdings Act, 1923, particularly sections 1—9 and 48. It should be remembered that compensation is obtainable by *the landlord* under section 10 in respect of deterioration of the value of the holding where the tenant has failed to comply with rules of good husbandry or the terms of the lease provided the landlord gives written notice to the tenant before the tenancy terminates of his intention to claim such compensation.

As to compensation for damage by game and for disturbance see sections 11—14 of the Act.

Section 15 deals with compensation to the tenant when a mortgagee takes possession under the mortgage.

Section 18 provides for the determination of claims for compensation where the holding has become split up amongst several persons upon the basis that the amount payable shall be apportioned between the several landlords of the various parts of the holding.

Any short summary of the law on the subject of compensation

payable to agricultural tenants would necessarily prove misleading and the reader is referred to the Act of 1923 and the leading text-books on Agricultural Holdings. Only two further observations on this matter are offered here, namely :—

(a) The question of local customs must always be borne in mind.

(b) Increased rents or fixed damages reserved or made payable in respect of breaches of contract by the tenant are not recoverable in so far as they exceed the actual damage suffered by the landlord except in respect of certain specified matters (Agricultural Holdings Act, 1923, s. 29).

In the absence of special provision (as in the above Condition) as to the person who is to pay the compensation it may be impossible to determine with certainty whether the vendor is liable to pay the amount of the compensation to the agricultural tenant if the purchase is not actually completed on the date fixed for completion. In *Richards* v. *Pryse*, [1927] 2 K. B. 76, the Court of Appeal dealt with a case in which a claim was made by a tenant of an agricultural holding under section 12 (1) of the Agricultural Holdings Act, 1923, which entitles a tenant who has quitted pursuant to notice given by the landlord to compensation for disturbance (except in certain specified cases). The contract for sale appointed October 27, 1924, as "the date fixed for completion". All rents and periodical outgoings were to be apportioned up to "the completion". After the date of the contract but before the date fixed for completion, notice was given to the tenant to quit the property on September 29, 1925. The purchase was not actually completed until October, 1925. The Court of Appeal held that "the completion" must be distinguished from the date for completion, and meant the actual completion. Under section 57 of the Act the "landlord" means the person for the time being entitled to the rents and profits. The contract entitled the vendor to the rents and profits up to the actual completion, and he was accordingly held to be the landlord within the meaning of section 57 and as such the person liable to pay compensation to the tenant.

It is interesting to compare with *Richards* v. *Pryse* (*supra*) the case of *Bradshaw* v. *Bird*, [1920] 3 K. B. 144. In that case the vendor gave the tenant notice to quit expiring on September 29, 1918. After the date fixed for completion but before actual completion the tenant gave the purchaser notice of intention to claim compensation. At the date when the claim (as distinct from the notice of claim) was made the purchaser had, however, actually completed his purchase. The purchaser was held to be the landlord

at the material date and was accordingly liable to pay the compensation. It was made clear by the Court in *Richards* v. *Pryse* (*supra*) that there was no authority establishing that a purchaser under a contract fixing a date for completion is, after the date fixed for completion and before actual completion, the landlord within the meaning of section 12 of the Act of 1923, even if during that time he is entitled to the rents and profits. As Lords Justices Bankes and Scrutton observed in *Richards* v. *Pryse* (*supra*), pending steps by the Legislature to clarify the position, vendors and purchasers should make it clear in their contracts who is to pay compensation to tenants. Compare also *Dale* v. *Hatfield Chase Corporation*, [1922] 2 K. B. 282.

It will be seen that under Condition 22 (2) the vendor is made liable only if the tenancy expires or determines on or before the date "fixed for completion". Otherwise the purchaser is to be responsible.

(b) *Landlord and Tenant Act claims.*

As to claims under the Landlord and Tenant Act, 1927, in respect of compensation for improvements, for goodwill or a new lease, see sections 1—6 of that Act.

The purchaser of property occupied by a lessee for the purposes of his trade or business should make inquiry as to any notice served by the lessee in respect of proposed improvements. Under section 3 (1) of the Act the lessee is required before effecting the improvement to give previous notice to the lessor of his intention to make the improvement as a condition precedent to any claim. Having regard to the definitions in the Act of "landlord" and "tenant" it would seem clear that any claim for improvements will be enforceable not only against the landlord at the time when the improvement is made but also against all subsequent owners of the reversion. Reference to section 3 of the Act should be made for further details, but one point worthy of note is that compensation cannot be obtained in respect of improvements made within the last three years of the tenancy.

To establish a claim for compensation for goodwill the tenant must show that

(1) The business has been carried on for the past five years either by the tenant who claims or by his predecessors.

(2) Notice has been given by the tenant of his claim within one month after service on him of notice to quit, or if the tenancy is not so determined, then not less than one year and not more than three years before the expiry of the term.

(3) The goodwill has added to the letting value of the property. Even if the tenant shows that at the end of the term the premises could, by reason of the goodwill created, be let at a rent higher than that at which they could have been let without such goodwill, he will not necessarily succeed. In other words it is not enough to show that valuable goodwill has been created or the value of existing goodwill increased during the term. If the landlord can show that he can let the property for some other purpose at an equal or higher rent no compensation is payable: *Hudd* v. *Matthews*, [1930] 2 K. B. 197.

The tenant must not have given notice himself: see further, section 4 of the Act.

In order to establish a claim to the grant of a new lease the tenant must first establish that he is entitled to compensation for goodwill and has satisfied all conditions in that connection. In addition he must establish that the sum payable under the Act as compensation would not in fact compensate him for the loss of goodwill which he would suffer if he were to remove and carry on his trade or business elsewhere: section 5 (1).

Whilst claims to compensation for improvements may be made in respect of premises used for any trade, business *or profession*, compensation for goodwill is only obtainable in respect of premises used for trade or business.

The notes above are given solely as reminders to practitioners advising purchasers. For all other purposes the Act itself should be referred to.

Condition 22 (3).

This Condition, which enables the purchaser to require the vendor of an *entire* agricultural holding to serve a notice to quit, forms a reminder that the tenant may be entitled to claim compensation even if the notice is served under a special provision in the lease entitling the landlord to resume possession for some specified purpose other than the use of the land for agriculture under section 25 of the Act of 1923.

As to notices by the vendor it will be seen that under this Condition the purchaser can require the service of a notice to quit only (a) where the entire holding is purchased, and (b) after accepting the title.

As to notices valid under the Act of 1923 and claims by the tenants for compensation, see the notes on Conditions 21 (1) and 22 (2) above, under the heading "Agricultural Holdings".

With regard to the provision in this Condition that the purchaser

is to *agree* to keep the vendor indemnified against claims by the tenant consequential on the notice to quit it is suggested that if the vendor, after contract and at the purchaser's request, serves on the tenant a notice to quit, the purchaser should indemnify the vendor against all such claims by the tenant unless there is an express agreement to the contrary. As the Condition stands it appears to be assumed that the purchaser will enter into a separate undertaking with the vendor.

In practice a vendor may well serve a notice at the purchaser's request without referring to this Condition or requiring any undertaking by the purchaser. It may be doubtful whether the purchaser could successfully resist liability on the ground that he had not in fact agreed to indemnify the vendor; but this is beside the point. It would seem more desirable that the purchaser's liability should be definitely established. It is submitted that the words placed in brackets in Condition 22 (3) might be deleted, the following words being added at the end of the Condition : " But the purchaser shall keep the vendor indemnified from all claims by the tenant consequential on the notice." This would also involve the insertion as a preface to Condition 22 (2) of the words : " Subject to paragraph (3) of this Condition."

(To be continued.)

CONVEYANCING WITH REGISTERED LAND.

(Continued.)

By F. R. Crane, LL.B., Solicitor.

III.—Transfer on Sale (*continued*).

In the previous article (*ante*, at pp. 245, 246) there was discussed the question of measuring boundaries on Land Registry plans and of scaling up to find the actual measurements. A few days ago the writer had occasion to try to ascertain the measurements of a plot of registered land. The plan on the Land Certificate was on the scale of 25 inches to the mile; the plot measured 21 millimetres by 5 or possibly 5½ millimetres! When scaled up this came to approximately 234 feet by 40 feet, but the odd half-millimetre—it was difficult to measure so exactly—meant a difference of 4 feet (the difference which entitled the purchaser to rescission in *Bellotti* v. *Chequers Development Co., Ltd.*, [1936] 1 All E. R. 89). As the question involved was whether a fence was in the right place, accuracy was required. No measurements at all were shown and a search at the Registry to inspect the transfer to the proprietor will have to be undertaken, but even that may not help, though presumably one of the transfers which have been made will contain measurements. It is submitted that if plans of this size are to define the extent of land (see Rule 272) measurements should be inserted.

(2) *Investigation of Title.*

(i) *The Abstract.*—After exchange of contracts the vendor must prepare and deliver the abstract. As previously stated (*ante*, pp. 251—254, and section 110) this will consist, first, of an authority to inspect the register (section 110 (1) and Rule 287) signed either by the registered proprietor or his solicitor. Provided the document states that the solicitor is signing as solicitor to the proprietor the Registry does not normally require any evidence of his authority to sign. Secondly, copies of the entries on the register, the filed plan, and of any documents noted on the register must be supplied, if required (section 110 (1)). It will be convenient if these copies show the date on which the Land Certificate was last compared with the register and made up, but more is said of this below.

For various reasons the vendor may not have the Land Certificate. If there is a charge it will be deposited either with the chargee or in the Registry (when a Charge Certificate will be issued —section 63 (1) and section 65, and see MORTGAGES) or it may be lodged in the Registry to meet a pending dealing (section 64) such as a transfer of another plot on the estate. In these cases, if a copy has not been kept, the Registry will supply official copies (section 113, Rule 296) at cost price (Practice Leaflet No. 2); it is also possible to attend at the Registry and make a copy—in pencil only (Rule 291)—and it seems that this, although unpopular with the Registry (see below), will not involve a fee. Copies of documents noted or referred to on the register can be similarly obtained. Official copies have the advantage of being admissible in evidence to the same extent as the principal (section 113) and, as will be seen, this may assist the purchaser in his investigation.

The vendor may also, subject to the terms of the contract, have to deliver an ordinary abstract relating to overriding interests not created by transfers referred to on the register, or to matters excepted from the effect of registration (section 110 (2) and *ante*, pp. 251—254).

(ii) *Investigation to Ascertain Particulars of Interests Noted on the Register.*—It was mentioned in the previous article (*ante*, pp. 251, 252) that an entry on the register of overriding interests or restrictive covenants frequently fails to disclose the extent of the grant or the terms of the imposition of the covenant—which latter are decisive in determining whether anyone is entitled to the benefit of the covenant (*Re Union of London and Smiths Bank*, [1933] Ch. 611; *Zetland* v. *Driver*, [1937] Ch. 651; [1938] W. N. 131). The entry on the register may merely state that the part coloured brown is subject to rights of way created by a transfer dated, etc., or that the land is subject to the covenants created by a transfer dated, etc., and set out in the Schedule thereto. It is therefore submitted that an abstract of noted documents should always be required (it cannot be refused—section 110 (1)) in order to ascertain the quantum of these rights. Verification of this part of the abstract may take one of three forms. The vendor may have obtained official copies, which can be inspected; it is suggested that it would be a satisfactory practice for copies to be obtained when the covenants are imposed and handed over to succeeding purchasers. Alternatively, the purchaser may himself obtain such copies on production of his authority to inspect (Rule 296). Finally, he may attend at the Registry, require production of the originals and examine his abstract therewith; this may involve a fee of 5s. (see below). It does not seem possible, in the absence

of a term in the contract, to force the vendor to supply official copies.

One point may be mentioned in regard to restrictive covenants, which are becoming a source of increasing litigation. It may happen that a purchaser is anxious to know what land was held by the covenantee at the time when the covenants were imposed (see *Re Ballard's Conveyance*, [1937] Ch. 473). In unregistered conveyancing the title deeds will frequently be of no assistance, although it is suggested that as a matter of conveyancing practice it would often be desirable to show the vendor's retained land on the plan to the conveyance imposing the covenants. Where the land is registered, however, if the original transfer is of no assistance, it is possible to ascertain by a search of the Index Map and Parcels Index (which are open to the public—Rule 12 (1)) approximately what land the covenantee held. As land is subdivided by sale fresh entries are made on the Map and in the Index and it will probably be possible to see that there was one title number comprising a large area of land including the plot in question. Thereafter, by noting the new numbers inserted on sales, it can be seen which are earlier in series than the one which is the subject of the sale. The Registry officials will probably be prepared to assist if it is difficult to place the title numbers in the order of their appearance.

(iii) *Official Searches by means of Form* 94.—It is held by the Registry that personal searches of the register are unnecessary by reason of the protection given by official searches on Form 94, which has recently been issued as Form 94a where the whole of the land, and Form 94b where part, is being purchased. Searches on the old form will be accepted until the stocks run out. The effect and form of a search require consideration before the Registry's scheme can be discussed.

An official search may be made by anyone entitled to inspect the register (Rule 292). The official certificate of the result of the search states whether any entries have been made on the register since the Land or Charge Certificate was last lodged in the Registry and made up with the register. Where a purchaser obtains such a certificate his application for registration, if lodged with the certificate before the fifteenth day after the date thereof, has priority over any other application, unless such other application was lodged pursuant to a priority notice or mortgage caution entered on the register before the issue of the certificate of search (L. R. R., 1930, r. 1, and L. R. R., 1936, r. 1). The 1936 Rules extended the period of protection from two to fourteen days. A priority notice may be lodged under Rule 88, with the registered proprietor's consent, and

gives fourteen days' priority to the application specified therein, but it will be seen that, so far as purchases are concerned, it has been rendered unnecessary. A mortgage caution entitles the mortgagee to notice of a proposed transaction but the mortgage will not be postponed if he take no action (sections 54, 55, 106, Rules 218, 225). An official certificate of search absolves the solicitor and, if he is acting for persons in a fiduciary capacity, his clients, from error (Rule 295). It is therefore extremely desirable to obtain a certificate within fourteen days of completion; the question to be discussed below is whether a personal inspection is also necessary.

The form which may be and normally is signed by the solicitor to the applicant must be completed in duplicate and lodged at the Registry; no covering letter is necessary. It falls into four sections, *viz.*, first, particulars of the county, the title number, the name of the registered proprietor, and on Form 94b, of the property; secondly, a certificate by the solicitors that their client has agreed to "purchase, take on lease or accept a registered charge" of the whole (Form 94a) or part (Form 94b) of the land, in the latter case identifying it by plan or reference to an approved plan (see below); thirdly, an application for an official search to ascertain whether there have been any entries since "the day of being [the last date on which the land or charge certificate was officially examined with the register] *or* [the date of an issue of an office copy of the subsisting entries]"; fourthly, a statement that the solicitors act for the registered proprietor or send an authority to inspect the register, and, finally, the name and address (in block letters) of the person to whom the certificate is to be sent.

Where only part of the land was being sold, it was formerly necessary to send two plans, with the original and duplicate of the form, one being returned with the official certificate. Recently (see *ante*, Conveyancer's Notebook, pp. 99—101) the Registrar has directed that if only one plan is sent the search will be accepted and the certificate returned without a plan. As certificates of search form no part of the abstract of title to registered land, the searching solicitor will probably not need to go to the expense of a duplicate plan. Sometimes, however, a chargee will be relying on the same search, in which event a duplicate plan will be desirable, unless the chargee's solicitor approves the form of the application for search (see *ante*, Conveyancer's Notebook, pp. 99—101). This recent direction of the Registrar also reminded solicitors that, if a building estate plan has been deposited in and approved by the Registry (who issue an officially stamped copy), the form of search need only refer to the plot number. If this method is used it will be essential to see that the plot on the plan and on the ground

correspond (see previous article, *ante*, pp. 245, 246, and BUILDING ESTATES, *infra*).

The date when the Land Certificate was last examined is stamped inside the front cover of the Certificate, while an official copy of course bears its own date. If such date is recent a purchaser will usually be safe in assuming that the search will not reveal any adverse entries, and the probabilities in this respect can best be considered in connection with a discussion of the Registry's plan for the investigation of title. This is explained in Practice Leaflet No. 2 and in notes to the forms of search; the contents of the Leaflet are summarised in the following paragraph, *viz.* :—

The purchaser's solicitor, it is suggested, should obtain a copy of the entries on the register and of the plan, with an authority to inspect. To ensure that these entries are up-to-date he should in the preliminary negotiations insist on the Land Certificate being made to correspond with the register up to the latest practicable date, and that this date should be notified to him. He should verify the copy entries by inspection of the Land Certificate, noting particularly the date when this was last made up, and then apply for an official search. If the Certificate is in the Registry to meet a dealing or is deposited with a chargee the purchaser's solicitor should either insist on the vendor obtaining an official copy (see above)—several copies will be issued at nominal cost on building estates—or obtain one himself. It is added that if the purchase price is below £1,000 (see section 110 (1)), and the contract has not provided that the vendor shall bear the cost of the abstract, the purchaser's solicitor can take notes of the contents of the Land Certificate at the office of the vendor's solicitor.

A number of points require comment, but it should first be mentioned that in order to encourage the Form 94 scheme it is provided (L. R. Fee Order, 1930, Abatement 10) that one official search is free but a personal search costs 5s.

The scheme does not cover the case where the vendor, on creating a charge which involves his parting with the Land Certificate, keeps a copy of the entries and makes up the abstract from such copy, adding a reference to the charge. Inspection of the Land or Charge Certificate in such circumstances would involve a fee but it is not clear whether the vendor must, as in unregistered conveyancing, bear this or whether he can tell the purchaser to go to the register. The writer's experience has been that the conveyancing practice as to inspection of the register varies, but that solicitors for purchasers frequently check the abstract by personal inspection (whether or not making an official search in addition) and do not require to see the Land Certificate before completion.

Furthermore, a production fee to a mortgagee's solicitors would be £1 8s., or at the best probably £1 1s., while inspection would cost 5s. It is submitted that in the above circumstances the vendor is entitled to tell the purchaser to inspect the register, and certainly discharges his duty by offering to pay the 5s. fee.

Secondly, an official search does not disclose the quantum of *e.g.*, overriding interests or restrictive covenants noted on the register. As has been previously stated (*ante*, p. 251) a purchaser can insist on being supplied with copies of documents noted on the register and normally interests are noted by reference to transfers. If the vendor has an official copy all is well. On the other hand, he may be able to supply an abstract from a copy which was kept when the interest was created—such copies might be kept and passed on with the Land Certificate as suggested above in regard to official copies—or may suggest that an official copy will be expensive and offer to pay an inspection fee for the purchaser. It would seem reasonable and helpful for the purchaser's solicitor to accept this offer, reserving the right to call for official copies if it seemed necessary after inspection. Alternatively the vendor's solicitor might take a copy on a personal inspection and send it to the purchaser's solicitor, who would verify by personal inspection! The contract might provide that the vendor should provide official copies but it would be difficult to insist on this in any case, and, it would seem, be impossible to do so if the vendor had unofficial copies. It should be remarked that, if noted documents are to be inspected, it is desirable to give the Registry a day or two's notice so that the documents may be ready. It is submitted that, as regards the point discussed in this paragraph, practitioners need not feel any responsibility for inconveniencing the Registry, since no difficulty would arise if the Registry would note on the register the terms of the grant of overriding interests or of the imposition of restrictive covenants. It can hardly be contended that this would make the register too long, especially as the Registrar has a discretion in regard to noting many overriding interests (*ante*, p. 44, section 70 (3)).

An error or alteration in the Land Certificate or copy plan therein is also a possibility, though probably remote, and the chance of error would be greater on a building estate involving a detailed plan; instances of such discrepancies are cited in Potter, *Conveyancing under Land Registration Act*, pp. 310, 311. The registered proprietor's land and estate therein are of course defined by the register and the map or plan at the Registry, not by the Land Certificate. The Act and Rules do not contain any provision for compensation if the Registry make

an error in the preparation of a Land Certificate, although this would seem to be a proper corollary to the scheme of official searches. A fraudulent alteration of a Land Certificate is a misdemeanour (section 116) but this will not assist a purchaser who has not got what he expected. Discovery of an error before completion would make the remedies of rescission and compensation available, but after transfer the covenants for title would have to be relied upon; the previous article (*ante*, pp. 254—257) discussed this matter. It may be truly said that the risk of such alteration is remote, but the practitioner has to consider the position of his client and himself in the unlikeliest cases.

The question of time in relation to the Registry's scheme also causes difficulty. The official search should obviously take place within fourteen days of completion but this may be outside the period allowed for requisitions by the contract. A defect might be so fundamental as not to be affected by the stipulations as to time (*Want* v. *Stallibrass* (1873), L. R. 8 Exch. 175) but it is submitted that the plea of waiver might be raised on the ground that there had been deliberate delay in the investigation of title. Apart from this, it is always desirable to deal with a flaw in the title at the earliest possible moment. A client would have, it is submitted, good cause for complaint if, by not searching until just before completion, his solicitor postponed discovery of a defect that might take time to rectify. Two official searches, one on delivery of the abstract and one before completion, might meet this particular problem, but a second official search on behalf of a purchaser, on the same authority from the registered proprietor, involves a 5s. fee, since the Registry take the view that the abatement (L. R. Fee Order, 1930, Abatement 10) does not apply to such a case. A personal search would therefore cost no more and would meet the difficulties discussed in the preceding paragraphs. To obtain a fresh authority to inspect the register (the original one being stamped, on the first search, by the Registry) would seem to amount to evasion of fees and is not a practice that could be recommended.

It therefore seems, in view of the points discussed above, that the Registry's scheme for investigation of title by means of official searches will frequently involve expense and a certain amount of risk, as compared with a personal search followed by an official search before completion. Practitioners will wish to do all they can to assist the Registry, but it is submitted that this is a case where its interests conflict with those of the client and of the practitioner, and therefore the latter must prevail.

Where the Registry's scheme is adopted it is very desirable to inspect the Land Certificate as soon as possible, rather than to

delay so doing until completion, except by arrangement. The writer, acting for a vendor, had a case in practice where the requisitions asked for the date on which the Certificate was made up, and this was duly given. Nothing else relating to the abstract happened until completion, when the solicitor on the other side stated that he had obtained an official certificate of search revealing no entries and therefore all was in order subject to his comparing the abstract with the Land Certificate. As the sale was of part only, however, the Land Certificate had been deposited in the Registry and the writer had only the deposit number (see later—Completion of the Purchase). Fortunately it was possible to adjourn to the Registry, have the Certificate produced, and complete the purchase there, but much needless inconvenience had been caused.

(iv) *Requisitions on Title.*—Under this head a number of points that may arise will be considered shortly.

Discharge of Registered Charge :—Frequently it will be necessary to make a formal requisition requiring the vendor to hand over on completion the appropriate form of discharge of a registered charge, a mortgage protected by a caution or a notice of deposit or intended deposit of the Land Certificate. Where the whole of the land is being transferred this will be a discharge of a registered charge signed by the proprietor thereof (see Rule 151 and Form 53, and Potter, *Conveyancing under Land Registration Act*, p. 396, Form LVII), an application for withdrawal of the mortgage caution signed by the proprietor thereof or his solicitor (Rules 222, 224, and Form 71), or an application for withdrawal of the notice of deposit signed by the person entitled to the lien (Rule 246; no prescribed form, but see Potter, *Conveyancing under Land Registration Act*, p. 399, Form LXII). The last-mentioned document may be signed by a branch bank manager. Where part only of the land is to be transferred, a discharge of a registered charge should be amended by adding a reference to an accompanying plan (Note to Form 53, L. R. R.). A mortgage caution, and a notice of deposit, which operates as an ordinary caution (Rules 239, 242) both entitle the chargee to notice of any proposed dealing (section 54) which will be registered unless the cautioner objects (section 55). An ordinary caution operates once only, however, and the transferee will take free therefrom in the absence of objection (Rule 221), whereas a mortgage caution cannot be so warned off and any dealing will be effected subject thereto (Rule 225). A purchaser of part of the land will therefore require a consent to the dealing in both these cases, since he will want positive evidence that the depositee does not intend to object. In such a case it is usual for a depositee protected by notice to sign a consent to the dealing (a bank branch

manager may do this) and it would seem that the same procedure should be followed by a mortgagee protected by a caution. There is no prescribed form, but in practice the writer has found it simplest to refer to the transfer, *viz.* : "I (depositee) hereby consent to the transfer to (purchaser) of the land comprised in a transfer dated, etc., and made between (vendor) of the one part and (purchaser) of the other part." This avoids the necessity of a plan to attach to the consent, though the depositee will want to see the transfer or a draft. It has also been found that this form, although not containing any application for the retention of the notice of deposit, did not result in its removal from the register relating to the retained land. A requisition requiring the Land or Charge Certificate to be lodged in the Registry before completion should also be made whenever the purchaser will not take it over (see section 64).

Death Duties :—A purchaser is not concerned with a notice of a charge for death duties (section 73 (7) and Rule 191) since a disposition to a purchaser for money or money's worth (section 73 (1) and (15)) vests the estate transferred free from all claims despite the notice. In such circumstances the Registrar has to give notice to the Commissioners of Inland Revenue so that they may claim from the vendor (section 73 (8)).

Dispositions by Persons Entitled to be Registered :—Such persons, entitled as a result of transmission on death or an authorised disposition, can make valid dispositions in the form that would be required if they were registered (section 37, Rule 81). Of course the ultimate transferee will only obtain a legal estate by registration (sections 19, 22). This power will be relied on by personal representatives and sub-vendors, and would seem to be available also to a devisee after assent. It is thought that the latter case will not often arise, since the purchaser would have to solve the difficulties raised by *Re Duce and Boots Contract*, [1937] Ch. 642, which are avoided if the devisee is himself registered. It is submitted that a purchaser need not accept a title made under section 37 unless the contract so provides. In practice a title by personal representatives is frequently made in this way. The purchaser should inspect the probate and in his requisitions stipulate that it be lodged at the Registry prior to completion, in which case an acknowledgment for its production in the transfer will be unnecessary (see *Re Miller and Pickersgill's Contract*, [1931] 1 Ch. 511, for the position in unregistered conveyancing). The doctrine of *Re Bridgett and Hayes Contract*, [1928] Ch. 163, may cause difficulty; if the land was settled prior to the death a restriction providing that purchase-money must be paid to A B and C D (the trustees) will appear on the register (Rule 58), but the grant

might be to X and Y, the deceased's general representatives. Here, as the Registrar might object to the validity of the grant, it would seem reasonable for the personal representatives to obtain registration before sale; therefore, if a sale is to be made under section 37 the purchaser should ascertain, by preliminary inquiries before contract, whether this case has arisen.

Prohibition Against Alienation of Leaseholds without Consent :— If such a term is contained in the lease the Registrar must enter a note (section 8 (2) and Rule 45) that " all estates, rights, interests, powers and remedies under such lease, arising upon, or by reason of, any alienation without licence, shall be expressly excepted from the effect of registration "—an example of a qualified title. As the Registry does not guarantee a title obtained by a transfer without consent, such consent need not be produced and the efficacy thereof, or the validity of a transfer without consent under section 19 (2) of the Landlord and Tenant Act, 1927, is a matter for the purchaser alone. The note is not often encountered in practice, since the prohibition usually occurs in leases of twenty-one years or less, which are overriding interests and incapable of registration (sections 8 (1) (a) and 70 (1) (k)).

Various points may also arise on investigation of title in particular cases. It is not possible to lay down any general rule for dealing with them, except that the general principles of registered conveyancing must be observed. It is desired, however, to emphasise again the importance of ensuring that the Land or Charge Certificate is handed over or lodged in the Registry prior to completion (see section 64).

(3) *The Transfer.*

The more important contents of the transfer—*e.g.*, parcels, covenants for title, were discussed in connection with the contract. It is perhaps desirable to reiterate that the transfer should carry out precisely the terms of the contract, which cannot usually be relied on after completion (*Knight Sugar Co.* v. *Alberta Ry.*, [1938] 1 All E. R. 266). Rectification of the transfer (see *Clark* v. *Barnes*, [1929] 2 Ch. 368) would involve Land Registry fees as well as costs.

Under this head, therefore, has to be considered primarily the form of the transfer. Generally, the specimen forms in the Schedule to the Rules must be used in all matters to which they refer or can be applied or adapted (Rule 74). The forms (see Nos. 19—44) are only outlines, so that fairly wide variation is not only permitted but necessary. In some cases the Rules makes specific provision for alteration (see, *e.g.*, Rules 118—124). Precedents for such

varied forms may be found in Potter, *Conveyancing under Land Registration Act*, and in any of the recognised sets of precedents. If none of these are satisfactory the practitioner must draft his own on the same lines (Rule 75); advantage can and should be taken of the Registrar's power to approve a draft (Rules 75, 78), as a rejected application for registration of a transfer will usually mean the loss of the Land Registry fees thereon (L. R. Fee Order, 1930, r. 7). Printed forms exactly following those in the Rules may be obtained from the Registry and law stationers but these are satisfactory only in the simplest cases. Engrossments must be on foolscap and must leave a wide margin on the left-hand side of each page for binding. It will be seen that the greatest difference from unregistered conveyancing is that, whereas a conveyance starts with a statement of the parties and recitals, subsequently proceeding to the operative part, a transfer begins with the operative part and the parties are mentioned in the body of the document where they join to perform their appropriate function. Ordinary recitals of title are not required because the register, read with the Act and Rules, shows what the vendor has. Where recitals are necessary it seems best to draft the transfer in the unregistered form, after setting out the heading referred to below.

The form must now be considered in more detail :—

Heading and Date :—Every transfer must have the following heading (see L. R. R., Form 19) :—

H. M. Land Registry.
Land Registration Act, 1925.

District
Title No.
Property

Dated the day , 19 .

As was mentioned in the first article of this series (*ante*, p. 46) these particulars must appear at the head of every document lodged at the Registry in connection with the title.

Consideration.—A transfer usually begins : "In consideration of £ paid to (the receipt whereof is hereby acknowledged)". The person or persons named may be the vendor, Settled Land Act trustees, a chargee, etc.; it does not seem necessary to state their capacity, as this will appear from subsisting entries on the register. Of course the purchaser must see that the transfer complies with any restrictions on the register regarding purchase-money (see, *e.g.*, Rule 58). The statutory form omits any receipt clause, but one is always inserted both to act as a

receipt and to authorise the solicitor to receive purchase-moneys (sections 67—69, L. P. A., 1925).

Operative Part.—The transfer continues : " I A B (vendor) as Beneficial Owner, Trustee, etc., hereby transfer to C D (purchaser) ". The registered proprietor must convey (see sections 18, 21) except in cases falling under section 37, above mentioned. Covenants for title have already been discussed. The operative word is usually " transfer ", but since 1925 there is no virtue in any particular word (section 51, L. P. A., 1925) except perhaps under special Acts (*e.g.*, the Land Clauses Consolidation Act, 1845); in such cases both words should be used.

The purchaser may be an individual or a corporation, or have some particular capacity, and a form will usually be found to meet the case (see, *e.g.*, L. R. R., Forms 21—24, 36). It should be noticed that a transfer to a tenant for life under the Settled Land Act (L. R. R., Form 21) must contain the particulars required for a vesting deed by section 5 of the Settled Land Act, 1925.

Parcels, General Words, All Estate Clause, etc.—Parcels, and the importance of extreme accuracy in the plan which defines the land (Rule 272), were discussed in the previous article. The application of the general words and all estate clause to registered conveyancing must now be considered, and it is thought that the need for accurate definition will be thereby emphasised.

By section 62 (1) of the Law of Property Act, 1925 (which section applies to registered land—sections 19, 20, 22, 23, L. R. A.), a conveyance or transfer passes to the purchaser subject to any expressed contrary intention, " all buildings, erections, fixtures, . . . fences, ways, . . . liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof ". While incorporeal hereditaments will readily pass or be created under this section (see *Clark* v. *Barnes*, [1929] 2 Ch. 368; *Borman* v. *Griffith*, [1930] 1 Ch. 493) yet it seems that as a rule land not actually comprised in the parcels, though enjoyed with the land conveyed, will not pass. This would seem to be so even if land is expressly conveyed " with the appurtenances ". Slesser, L.J., said recently, discussing the meaning of the word " appurtenances " in section 188 of the Housing Act, 1936, " as pointed out in the early case of *Bryan* v. *Wetherhead* (1625), Cro. Car. 17, the word ' appurtenances ' will pass with the house the orchard, yard, curtilage and gardens, but not the land . . . no case has been cited to us in which the word appurtenances has ever been extended to include land which

does not fall within the curtilage of the yard of the house itself—that is, within the parcel of the demise of the house" (*Trim* v. *Sturminster R. D. C.*, [1938] 2 All E. R., at p. 169, and see cases collected in *Norton on Deeds* (2nd ed.), at p. 276). The general words will therefore be helpful in unregistered conveyancing if "All that piece or parcel of land known as No. 1 The Avenue Middleton" is conveyed without reference to a plan; the back garden will pass. In registered conveyancing, however, no such wording is possible, for the plan defines the land and if part of the actual garden is not comprised in the plan, such part will not pass.

Subject to any contrary intention, all the estate, right, title and interest the vendor has in the land passes to the purchaser (section 63, L. P. A., 1925); the section refers not to physical property but to legal or equitable interests held by the vendor (see *Norton on Deeds, supra*, p. 298). The rule appears to extend to registered land (sections 20 and 23), but in view of the precise terms of sections 20 and 23 seems unlikely to be of assistance. A problem does arise, however, in connection with the acquisition of a title by adverse possession. In computing the period of twelve years, necessary under the Real Property Limitation Act, 1874, to bar the owner's right of action, a purchaser can add the period of his vendor's possession, provided that such interest as the vendor had was assigned to the purchaser. If there was no such assignment the purchaser must start again (see Cheshire, *Modern Real Property* (3rd ed.), at p. 796). In unregistered conveyancing the parcels will generally include the piece of land to which a title is being acquired, either expressly or by virtue of the general words in a case such as that exemplified above, and the all estate clause will operate to assign the vendor's interest. In registered conveyancing, however, the land to which there is title is clearly defined and limited by the Land Registry plan, so the general words and all estate clause will not help. The wording of the parcels in the statutory form is "the land comprised in the title above referred to". To enable the purchaser to add the periods it seems that a conveyance off the register, as of a minor interest, is necessary (sections 101, 102).

The above problems have been considered fully because the writer recently had his attention forcibly drawn to them in practice. By some error the Land Registry plan excluded a small area appearing as an oblong indentation in the area edged pink. In fact this oblong was the fireplace of one of the principal rooms! It had been enjoyed with the house for over twenty years but no one person had been owner for twelve years at a time. Fortunately the

purchaser was also buying the house next door, but it is submitted that, had this not been so, it would have been impossible to advise that a title by adverse possession had been obtained. It should perhaps be mentioned that the *Chowood* cases (*ante*, pp. 125, 126) do not assist in this connection because there the title by adverse possession was obtained prior to first registration.

Habendum.—This is unnecessary, since sections 20 and 23 sufficiently define the estate transferred but if the land is leasehold there are added to the parcels the words "for the residue of the term created by the registered lease" (L. R. R., Schedule, Form 32).

Covenants for Indemnity.—These have already been considered (*ante*, pp. 254—256).

Application for Entries on the Register.—The desirability of applying for the entry of a note of overriding interests (section 70 (3)) has been previously mentioned. The application should also be made in other cases where an entry is provided for by the rules, *e.g.*, on the imposition of restrictive covenants (Rule 135, Form 43) or on a transfer to a tenant for life or co-owners (Rules 56—59, Forms 21, 22).

Acknowledgment for Production.—This will only be necessary where the vendor has had to make a title apart from the register under section 110 (2) but may also be useful where personal representatives are selling under section 37 to provide a method by which to force them to lodge the grant in the Registry. It would probably be more convenient, however, to postpone completion till the grant was lodged.

Certificate of Value.—In appropriate cases this should be incorporated in the usual form.

Execution and Attestation.—The transfer should be executed in the usual way (see section 38, L. R. A., and sections 73—75, L. P. A., 1925). Any power of attorney under which a transfer is executed must be filed at the Registry (Rule 82). It is extremely important to remember that any plan annexed to the transfer must be signed by both parties (Rule 79).

(4) *Completion of the Purchase.*

A transfer or any other registrable disposition of the registered estate in freehold or leasehold land is to be completed by entry on the register of the transferee as proprietor of the estate transferred; till then the transferor remains proprietor (sections 19, 22). On registration a disposition confers on the transferee the fee simple, term of years or other estate expressed to be dealt with

together with all rights that would pass under the Law of Property Act, 1925 (see above) but subject to overriding interests, interests protected on the register and, in the case of qualified or possessory titles, certain other rights (sections 20, 23).

These provisions emphasise the importance of registration of the transfer. This dates from the day of lodgment (Rule 83), which should therefore take place within fourteen days of the date of the official search. On completion the purchaser will require to receive all documents and particulars necessary to enable him to register. It is proposed to consider separately the points that will commonly arise :—

(a) *Land or Charge Certificate.*—This must be lodged on any transfer (section 64) and must therefore be handed over or deposited in the Registry. In the latter case the vendor must complete Form A. 15 (obtainable free at the Registry) by inserting the title number, particulars of the documents left, the reason for leaving them—usually, to meet transfer of part—and finally the name and address, in block letters, of the person or firm by whom the documents are left and to whom those not retained are to be returned. The completed form, with the Certificate and any other documents, is lodged at the Registry, and the official deposit number is obtained, to be subsequently passed on to the purchaser.

(b) *Transfer.*—This must of course be handed over duly executed and with any plan signed.

(c) *Discharge of Charge or Consent to Dealing.*—The appropriate document (see above—Investigation of Title) must be handed over; it should not be lodged on deposit at the Registry in case completion goes off or is postponed.

In this connection practitioners will be aware that many building societies will not execute the statutory receipt until their next meeting after the money is paid; on completion only their solicitors' undertaking to have the receipt executed is handed over. This seems an entirely unjustifiable departure from both law and practice, but might is, regrettably, right in this instance. Fortunately the Registry take a practical and helpful view and permit an application for the registration of a transfer to be lodged without the statutory receipt, provided the undertaking of the society's solicitors is lodged. The statutory receipt can then be lodged in due course—not necessarily within fourteen days of the official search. Form A. 14 is used for lodging documents in connection with a pending registration; it is identical with A. 15 above discussed, except that the application number of the pending registration must also be supplied.

(d) *Other Documents.*—Documents other than those already mentioned may be relevant in particular cases, of which a few may be noted. The original lease will be handed over on a sale of leasehold land; where title is made to certain matters off the register by virtue of section 110 (2) the documents abstracted will be dealt with on completion in accordance with the rules of unregistered conveyancing; the lodgment of the probate or letters of administration in the Registry on a sale by personal representatives has already been considered. Finally it should be noted that the registered proprietor often has the old documents of title that applied before the first registration. These, it is submitted, should be passed on to the transferee, although they do not seem likely to serve any useful purpose except in the unusual case of an application for rectification on the ground of an error—*e.g.*, in the plan—at the time of first registration.

(e) *Other Matters.*—Apportionments, etc., will be made in the usual way and need no discussion here.

(f) *Stamps.*—The transfer must as in unregistered conveyancing be stamped under the Stamp Act, 1891, and if necessary produced under the Finance Act, 1931.

(g) *Completion of Application Cover.*—In order to lodge the transfer and other documents at the Registry the appropriate application cover must be completed; Form A. 4 is used for dealings other than transfers of part, for which A. 5 must be used. The particulars to be supplied—there are spaces on both the front and back of the forms—must now be considered.

After spaces for the Registry's application number and fees (see below) the vendor's title number must be inserted and, in Form A. 5, particulars and the deposit number of any documents relating to the vendor's title which have already been lodged; if these are sent with the application for a transfer of part Form A. 15 (*supra*) should also be completed. Normally the vendor's land certificate will be the only document so lodged.

Next are four columns in which must be stated the nature and priority of applications (*e.g.*, discharge of registered charge, transfer, charge), the value thereof, the fees paid and any remarks —for instance, that the mortgage receipt will follow when received and that in the meantime an undertaking by the solicitors to the building society is lodged.

Then a list of the documents left (in Form A. 5 this is limited to those concerning the purchaser's title—see above as to the vendor's title) must be completed and thereafter the names and addresses of the solicitors to whom lodged documents not retained in the Registry are to be returned, of the person to whom the new

land or charge certificates are to be sent, the name and address of the transferee's solicitors, and the transferee's address for service which is to be entered on the register, *i.e.*, his residence *after* completion.

If the transfer or assent is to joint tenants the solicitors completing the form must state whether the transferees or assentees are entitled for their own benefit and whether the survivor will be able to give a valid receipt. This is required because, if the survivor of the joint proprietors will not be able to give a good receipt, a restriction must be entered to the effect that if the number of proprietors is reduced to one no disposition shall be registered except under an order of the Registrar, after investigation of the title, or of the Court (section 58 (3); Rule 213; Form 62). If a joint tenancy at law and in equity is converted into a tenancy in common in equity the proprietors so converting can apply for the entry of a restriction (section 58 (1)). It is submitted that a purchaser is not concerned to see whether such a restriction should have been entered, since he takes free from all interests except overriding interests and those protected on the register (sections 20, 23). If the joint proprietors are trustees for sale for persons other than themselves, or are statutory owners under the Settled Land Act, 1925, a restriction must be entered providing that no disposition except those authorised by the Settled Land Act is to be registered and that purchase-money must be paid to at least two proprietors (Rule 58, Forms 9, 10).

If the transfer is to a limited company a copy of the memorandum and articles, and of the certificate of incorporation, both certified by the secretary or solicitor to the company, must be produced (see Rule 121). It may also be noted here that if a charge by a limited company is registered a certificate under section 82 of the Companies Act, 1929, as to its registration under that Act must be produced, and a certificate that it does not contravene the memorandum and articles.

Where the vendor has had a possessory title for ten years if the land is leasehold and fifteen if it is freehold, the proprietor is entitled to conversion to good leasehold or absolute title (section 77 (3) (b); Rule 48). Such conversion will take place automatically if it is stated on the application cover that the transferee is in possession or in receipt of the rents and profits; Form A. 4 has a note drawing attention to this. If the vendor has had title for a shorter period application for conversion must be made on Form 8 in the Schedule to the Rules (see Rule 49), and all documents relating to the title sent; usually the Registrar will convert but he has a discretion (section 77 (2)). If it is

desired to convert a good leasehold into an absolute title Form 7 in the Rules should be completed. There is no extra fee if the application for conversion is made on a transfer (L. R. Fee Order, 1930, para. (vii)).

The application cover is then signed by the transferee's solicitors and is ready for lodgment. There is, however, one further paragraph in Form A. 4, being an application for the issue of the land certificate if the application is only for the discharge of the sole remaining charge.

(h) *Lodgment of Application and Payment of Fees.*—The completed application and documents must be lodged by hand or post (when a cheque for the fees must be sent) at the Registry, which is open for this purpose between 11 a.m. and 3 p.m. Applications lodged between these hours are deemed to be received just before closing, and if lodged at other times are deemed to be received just after the next opening time (Rule 82).

The fee stamps are impressed on the application cover, and the application number, which must be quoted in all communications, is also affixed thereto. Applications are not now received by an officer but are posted in the box provided, particulars of the application number being sent to the solicitors.

The scale of fees is No. 4 in the L. R. Fee Order, 1930, and is as follows :— up to £750, 1s. per £25 or part thereof; from £750 to £1,500, 3s. per £50 or part thereof; from £1,500 to £10,000, 2s. 6d. per £50 or part thereof; from £10,000 to £50,000, 2s. per £100 or part thereof; and from £50,000 to £100,000, 10s. per £1,000 or part thereof, amounts over £100,000 being charged as £100,000. These rates are consecutive, *i.e.*, the fee on a purchase price of £5,000 is £12 10s., being 1s. per £25 for the first £750 = £1 10s., 3s. per £50 for the next £750 = £2 5s., and 2s. 6d. per £50 for the remaining £3,500 = £8 15s., a total of £12 10s.

(i) *Issue of New Land or Charge Certificate.*—After a fortnight or so the new certificate will be issued to the purchaser's or chargee's solicitors, who should examine it carefully to see that everything is in order before acknowledging receipt.

(j) *Costs.*—These are governed by the Solicitors Remuneration Orders of 1925 and 1936; the first sets out the charges which may be made and authorises a 33⅓ per cent. increase, while the second restores this increase, which was reduced to 25 per cent. by an Order of 1932. Negotiating fees are chargeable as in unregistered conveyancing; the scale applies in all cases except those in which the vendor has a Possessory or Qualified title which is investigated apart from the register, when item remuneration applies. The

scale covers such work as is covered by the unregistered scale and it is similarly possible to elect, before business is begun, to be remunerated on an item basis. The registered scale is one-half the unregistered scale and, while this is not the place to discuss its adequacy, it is submitted that this is a question which will soon require serious attention, having regard to the increase of registered land and to the numerous points that frequently arise. The scale (before the addition of one-third) is :— for the first £1,000, 15s. per £100 (minimum of £1 10s.); for the second and third £1,000, 10s. per £100; for the fourth and fifth £1,000, 5s. per £100; for the sixth and each subsequent £1,000 up to £10,000, 4s. per £100, and from there up to £100,000, 2s. per £100. Fractions of £100, if under £50, are reckoned as £50, and if over £50, as £100.

(To be continued.)

THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1938.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

(a) *Generally.*

Conveyancers dealing with small dwelling-houses frequently have to consider the question of the application of the Rent and Mortgage Interest Restrictions Acts to such houses. The legislation on this subject has since its inception tended to become progressively more involved, and a consolidating as well as amending Act would have been of inestimable assistance to practitioners. The new Act which came into force on May 26, 1938, does practically nothing to simplify the mass of statutory provisions governing the subject, and on the contrary appears to have added considerably to the confusion. Eight Acts of Parliament now have to be construed together, and in order to satisfy himself as to the position with regard to those Acts the purchaser of one small dwelling-house may have to investigate in detail the history and conditions of weekly tenancies of the house over a quarter of a century.

Perhaps the most important provision of the 1938 Act, as affecting generally every purchaser of a house which may be subject to control by the Rent Acts, is section 7 (1). It will be remembered that there has been much confusion as to whether, where there is a dispute as to the application of the Rent Acts to a particular house, the burden is upon the tenant to show that he is entitled to the benefit of the Acts or upon the landlord to show that the Acts do not apply to this tenancy. Until the passing of the Act of 1933 there was no doubt that the burden of proof was on the landlord. But it was laid down by the Court of Appeal in *White* v. *Bembridge*, [1935] 1 K. B. 244; 104 L. J. K. B. 256, and *Heginbottom* v. *Watts*, [1936] 2 K. B. 6; 105 L. J. K. B. 337, that after the passing of the Act of 1933 the onus lay upon the tenant of a dwelling-house to show that the house was still controlled, and not upon the landlord to show that the house had become decontrolled. These decisions were based upon the words of section 1 (2) of the Act of 1933, which provided that after September 29, 1933, the Acts *should not*

apply to any dwelling-house *unless* it was a dwelling-house to which they applied immediately before the passing of that Act or then formed part of such a dwelling-house, and was also a dwelling-house falling within the specified limits of recoverable rent or rateable value.

Now, however, section 7 (1) of the Act of 1938 expressly enacts that "if any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown". The intention of this section is clearly to cast upon the landlord the burden of proving that the house is not controlled by the Rent Acts. This means that a purchaser who is buying a house as decontrolled should see that he is being placed in a position to prove decontrol if the need arises. Since the statutory presumption arises *in any proceedings* where the question of control is raised, a landlord should in the first proceedings in which the question arises ask for a declaration that the dwelling-house is one to which the Rent Acts do not apply.

Nevertheless it is to be observed that the new Act is in this respect rather curiously drafted. The provisions of section 7 (1) must be read in conjunction with section 2 (1), the phraseology of which is similar to that of section 1 (2) of the 1933 Act. Can it be suggested that the landlord's obligation under section 7 (1) of showing that the Acts do not apply to a house is satisfied by turning to section 2 (1), which says that the Acts shall not apply to the house unless certain requirements are satisfied, it being then left to the party alleging control to establish those requisites? The Act does not in terms say that those requisites shall be deemed to be complied with unless the contrary is shown. It may be thought probable, however, that the Courts would take the view that as these two sections are contradictory, the earlier one must be read as qualified by the later one, so that in the result those requisites are in fact deemed to be complied with unless the contrary is shown. Certainly an unhappy mode of legislation has been chosen here to effect the desired intention, and these sections of the Act may in due course come before the Courts for judicial interpretation.

(b) *A Measure of Decontrol.*

By section 1 of the 1938 Act the Rent Acts are continued in force until June 24, 1942. Presumably they will then be again modified and extended for a further term. Until September 29, 1938, they continue to apply to the same classes of houses as

heretofore, but as from that date the Acts do not apply to a house unless it is one to which they applied immediately before the passing of the 1938 Act, and is also a house of which the rateable value on the appointed day did not exceed £35, if the house is situate within the Metropolitan Police District or the City of London or in Scotland, or £20 if the house is situate elsewhere. The adoption of rateable value alone as the test is a slight simplification, but one which can affect but few cases in practice. The rateable value is still to be ascertained by reference to the "appointed day" as fixed by the Act of 1933, namely, April 6, 1931, in the County of London, and April 1, 1931, in the remainder of England (see 1938 Act, s. 8 (2)).

The effect of this sub-section is that, of those houses hitherto known as Class "B" houses, those with a rateable value above the limit fixed by the new Act join the Class "A" houses and are decontrolled. But to this an important exception is made by sub-section 2 of section 2. If part of a house which was controlled immediately before the commencement of the new Act was on December 6, 1937, lawfully sublet and occupied, or "vacant and to let", as a separate dwelling, the house as a whole may under certain circumstances remain subject to control. For the rateable value on the appointed day of the part which was sublet or to let as aforesaid is to be subtracted from the rateable value of the whole house on the appointed day, and if the balance remaining does not exceed the respective figure of £35 or £20, then the rateable value of the whole house is to be treated for the purposes of section 2 (1) (but not for the purposes of any other provision of the Act), as not having exceeded that figure. Thus, assume a dwelling-house in London with a rateable value of £45, controlled prior to the passing of the 1938 Act; a part of the dwelling-house, having a rateable value of £15, being lawfully sublet and occupied as a separate dwelling on December 6, 1937: the whole house will remain subject to control, since the balance of the rateable value, after subtracting £15, is only £30. The following portion of the sub-section deals with an anomaly which might otherwise in some cases arise. Where the rateable value of a dwelling-house, as in the illustration above, is treated as not having exceeded either £35 or £20, as the case may be, then so long as that dwelling-house remains controlled, the rateable value on the appointed day of any dwelling-house which forms part of that whole house is also to be treated as not having exceeded that amount. Thus, in the illustration given above, a later sub-tenant may take over a much larger portion of the house, the sublet portion being now of a rateable value on the

appointed day of £40. Notwithstanding this, the rateable value of the sublet portion on the appointed day is to be treated, so long as the house as a whole remains controlled, as not having exceeded £35.

The First Schedule contains transitional provisions to deal with houses which cease to be controlled by virtue of the 1938 Act. These follow the same form as the corresponding provisions in the Act of 1933. Anyone who, on September 28, 1938, is a tenant by virtue *only* of the Rent Acts, is entitled to retain possession until given one month's notice in writing. Such notice may be made to expire on September 29, 1938, or on any subsequent date. The notice may be qualified by the offer of a new tenancy, and if the notice be accompanied by an offer in writing of the landlord's terms and a written statement that, if the tenant retain possession after the date specified without other terms being agreed, he will by virtue of the 1938 Act be deemed to remain on those terms, then if he does so retain possession he will be deemed to do so on those terms. The acceptance of rent after the expiration of the notice does not affect its validity. Where controlled premises are used partly for business purposes, the provisions of the Landlord and Tenant Act, 1927, will apply upon the expiration of a notice served under these transitional provisions; if the tenant has served a notice requiring a new lease or the landlord has served a notice offering a renewal of the tenancy, no presumption then arises that by merely remaining after expiration of the landlord's notice under the 1938 Act the tenant has accepted the landlord's terms. As in the 1933 Act, the transitional provisions extend control of a mortgage of a house decontrolled by the Act for a period of six months from the passing of the Act.

(c) *Restriction of Decontrol by Actual Possession.*

With certain exceptions in the case of houses which are sublet, the system of decontrol by actual possession is abolished by the new Act. It will be remembered that this method of decontrol was introduced by section 2 of the 1923 Act, the effect of which was that where the landlord of a controlled dwelling-house had actual possession at the passing of that Act, or came into actual possession at any time thereafter, then from and after the passing of that Act, or from and after the date when the landlord subsequently came into possession, as the case might be, the house became decontrolled. Decontrol also occurred upon the tenant accepting from the landlord in certain circumstances a lease for a term of not less than two years.

The Act of 1933 restricted the application of this section by providing that it should cease to apply to Class "C" dwelling-houses as delimited by that Act.

Now it is enacted in general terms by section 3 of the 1938 Act that section 2 of the Act of 1923 shall cease to have effect, thus extending to all controlled dwelling-houses the rule applicable, since 1933, to Class "C" houses. It is clear, upon the construction placed upon the corresponding words of the 1933 Act, that this section is not retrospective and operates only as from the passing of the 1938 Act (see *Brooks* v. *Brimecome*, [1937] 2 K. B. 675; 106 L. J. K. B. 801).

The exceptions to this enactment are two in number. The first reproduces a corresponding exception contained in the 1933 Act in relation to Class "C" dwelling-houses. There can still be decontrol by actual possession or by the grant of a lease in the case of a dwelling-house falling within the new limits of rateable value but forming a part of larger premises falling outside those limits, if the letting which constituted it a separate controlled dwelling-house was a subletting by a person who at the time of such subletting was entitled to retain possession under the Rent Acts or would have been so entitled if he had not then had some other right to retain possession.

The second exception relates to section 2 (2) of the 1938 Act, and is new. It has been seen above that certain dwelling-houses continue controlled although they actually fall outside the rateable value limits fixed by the new Act, by reason of the fact that part was on December 6, 1937, lawfully sublet and occupied, or vacant and to let, as a separate dwelling. Where a dwelling-house would have ceased to be controlled by virtue of the new Act, but for the provisions of section 2 (2), decontrol by actual possession or by the grant of a lease is still possible in respect of that dwelling-house. For an illustration the example already cited above to illustrate section 2 (2) may again be used. A house in London with a rateable value of £45 on the appointed day remains controlled because a part with a rateable value of £15 was lawfully sublet and occupied as a separate dwelling on December 6, 1937. The house as a whole is a dwelling-house to which the Rent Acts would have ceased to apply but for the provisions of section 2 (2), and therefore it remains subject to decontrol by the landlord obtaining actual possession or by the grant of a lease. If there is a controlled tenant in possession of the sublet part, the landlord may under section 2 of the 1923 Act decontrol the residue of the house by obtaining actual possession thereof. The sublet dwelling would have continued controlled

regardless of section 2 (2), and so does not fall within this exception. If the rateable value of the sublet part were £40, however, it would remain decontrollable by actual possession.

(d) *Continuance of the System of Registration.*

The Act of 1938 extends to practically all controlled dwelling-houses the system of registration formerly applicable only to Class "C" dwelling-houses. If the landlord of a dwelling-house let as a separate dwelling immediately before the passing of the new Act, being a house of a rateable value not exceeding the limit fixed by section 2 of the Act, claims that such dwelling-house had prior to this Act become decontrolled under section 2 of the Act of 1923, he must within three months after the passing of the 1938 Act apply to the local council for the registration of the dwelling-house. This does not apply, however, to any Class "C" houses. Such houses cannot indeed as a general rule have become decontrolled under section 2 of the 1923 Act since the passing of the 1933 Act, and if the landlord claimed that they had so become decontrolled prior to the passing of that Act, they should have been registered under the 1933 Act.

A landlord who fails to register within three months of the passing of the 1938 Act may apply to the county court for a certificate of reasonable excuse for the failure to make application within the three months (section 4 (3)). He must show that the failure was due to "illness, absence from the United Kingdom or some other similar cause" or "was otherwise attributable to some cause beyond his control" (sub-section 6). This latter provision is new, and although it is couched in somewhat vague terms it is clear that mere ignorance of the law, for example, is not a reasonable excuse within the meaning of the section. No certificate of reasonable excuse may be granted after one year from the passing of the 1938 Act. After a certificate is granted, application for registration must be made within seven days thereafter. Registration thus effected after the expiry of the three months is conveniently known as "late registration".

The provisions of the 1933 Act with regard to the keeping of registers by local authorities, and the cancellation of registration where the Court has determined a registered dwelling-house to be controlled, are by sub-section 3 of section 4 of the 1938 Act made applicable to registration under the new Act. It is also provided (sub-section 5) that the Minister's regulations with respect to the form of application for registration are to contain provisions designed to secure that applications shall contain a statement of

one or more of the grounds on which the landlord claims decontrol under section 2 of the 1923 Act. This is provided for in the form prescribed by the Rent Restrictions Regulations, 1938; there is, however, no provision debarring the landlord from subsequently setting up additional grounds.

The rules prescribed by the 1933 Act for registration of decontrolled Class "C" houses were similar to the rules now prescribed by the 1938 Act, but there was no restriction upon the discretion of the Court as to what excuse was to be regarded as reasonable (resulting in some variation in the practice followed in different Courts) and there was no limit of time within which the certificate could be granted by the Court. It is therefore still possible, at the present day, to make an application to the county court under the 1933 Act for a certificate of reasonable excuse in respect of a Class "C" dwelling-house; to meet this, it is provided by section 4 (4) of the 1938 Act that no certificate shall be granted under the 1933 Act after the expiration of three months from the passing of the 1938 Act.

It is now necessary to consider the effect of registration and of failure to register a dwelling-house as decontrolled. Registration does nothing more than protect a landlord's right to claim decontrol. It does not prove nor even afford evidence of decontrol. If the landlord claims that a controlled dwelling-house had prior to the passing of the 1938 Act become decontrolled under section 2 of the Act of 1923, and it appears that but for that section of the 1923 Act the Acts would have applied to the dwelling-house and that no application has been made by or on behalf of the landlord within the specified time, the dwelling-house is to be deemed to be a dwelling-house to which the Acts apply and the landlord cannot be heard to contend otherwise. Purchasers buying houses as decontrolled under section 2 of the 1923 Act must therefore make sure not only that they will be in a position to prove such decontrol but also that their right to give evidence to prove the same is properly protected by registration. It is only in respect of decontrol under section 2 of the 1923 Act that the requirement of registration exists; a decontrol effected, for example, by a furnished letting (see 1920 Act, s. 12 (2), proviso (i)) does not require to be protected by registration.

Where late registration is effected under a certificate of reasonable excuse, the result is now very different from the result of registration in time. It is expressly provided by the 1938 Act that in the case of late registration section 2 of the Act of 1923 is to apply "as if references in the said section two to the passing of that Act were references to the date on which

the application for registration is made". This applies not only to late registration under the 1938 Act but also to late registration under the 1933 Act effected under a certificate granted after the passing of the 1938 Act. Construing the 1923 Act in the manner directed, the result is that a decontrol protected by late registration is only operative from and after the date of the application for registration if the landlord is in actual possession of the dwelling-house at the date of such application; if the landlord is not then in possession of the dwelling-house, but subsequently comes into possession of it, the decontrol will be operative from and after the date when the landlord subsequently comes into possession. In the case of *Stokes* v. *Little*, [1935] 1 K. B. 182; 104 L. J. K. B. 38, the county court Judge erroneously took the view that the above was the effect of the corresponding section of the 1933 Act. In this, however, he was overruled by the Court of Appeal, which held that the Legislature had not merely given the landlord a right after the late registration to enter into possession and then take advantage of section 2 of the Act of 1923; it was held that the effect of the 1933 Act was to place the landlord, when he effected late registration, in the same position as if he had registered within the three months. It is clear, however, that by the addition of the new words to the corresponding provision of the 1938 Act, the Legislature has altered the law so as to penalise the landlord who registers out of time under a certificate of reasonable excuse. Unless he is in possession when he makes his application for registration, the decontrol will only be effective from the time he next has actual possession of the dwelling-house. Owners of houses which should be registered as decontrolled under the Act of 1938 will therefore find themselves at a great disadvantage if they fail to effect registration on or before August 26, 1938.

(e) *New Provisions as to Rent and Rent Books.*

The 1938 Act contains a number of amendments of the law affecting the rent chargeable in respect of controlled dwelling-houses.

By section 5 a uniform rule is introduced for determining the standard rent of a controlled dwelling-house which forms part of a larger controlled dwelling-house. In all such cases now the standard rent of the smaller house is to be an apportioned part of the standard rent of the larger house, and the apportionment will be made under section 12 (3) of the Act of 1920. Previously the rule was that if the smaller dwelling-house was let as a separate dwelling on August 3, 1914, or if neither house was let on that

date but on a subsequent date the smaller house was first let as a separate dwelling before the larger house was so let, then the standard rent of the smaller dwelling-house was taken to be the rent at which it was let on August 3, 1914, or the rent at which it was first let after that date, as the case might be; whereas if the smaller house was not let as a separate dwelling on or before August 3, 1914, and was first so let at some date after the larger house had been so let, the standard rent of the smaller dwelling-house was an apportioned part of the standard rent of the larger house. Now it will be the subject of an apportionment in all cases.

One of the increases upon the standard rent permitted under the Rent Acts is, by section 2 (1) (b) of the Act of 1920, any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the period which included August 3, 1914. Under this section it was held in *Nicholson* v. *Jackson* (1921), 37 T. L. R. 887 (H. L.), and other cases that where the landlord paid the rates, and was allowed a compounding allowance, he could only increase the rent by the net rates paid after deducting the allowance. It is now provided by section 7 (2) of the 1938 Act that the amount of any allowance made to the landlord is to be treated as part of the amount payable by the landlord in respect of rates, so that the permissible increase of rent will now be calculated upon the basis of the gross amount of the rates. The new provision will apply to a house in England as from the date of the first demand for a general rate made after October 1, 1938.

By section 7 (4) of the new Act an alternative is provided to the old form of notice of increase of rent. Where the landlord has possession of a dwelling-house he may now serve on any prospective tenant a notice in writing that the rent to be charged is a rent which has been increased in accordance with the provisions of the Acts, and if the prospective tenant takes the dwelling-house the increase will be operative forthwith.

In future a tenant or mortgagor entitled to the protection of the Rent Acts will, by section 7 (6) of the new Act, be able to recover overpayments within two years of the date of payment; this does not apply to payments made more than six months before the passing of the new Act.

The provision by the landlord of a rent book or other similar document is now made compulsory in respect of controlled weekly tenancies (see section 6 of the 1938 Act). Any document authorised or required by the Acts to be served on the landlord by the tenant may be served on any agent of the landlord named as such in the rent book or on any person who receives the rent; and either of

those persons may be required to disclose the name and place of abode or place of business of the landlord (section 7 (5)).

(f) *Miscellaneous Amendments.*

A number of miscellaneous amendments are effected by the new Act; it is not possible in the space available to deal with all of them here. By section 7 (3), alternative accommodation is not to be deemed suitable to the needs of a tenant and his family if their occupation thereof would result in overcrowding under the Housing Act, 1936. This would appear to follow from general principles without the need of express enactment on the point.

The penalty for making without a *bona fide* claim an entry in a rent book showing a tenant as being in arrear in respect of a sum which is irrecoverable under the Acts, is by the Second Schedule increased from £10 to £20. Section 2 (1) of the 1933 Act now ceases to have effect; this is because that sub-section now merges in the wider provisions of section 3 (1) of the new Act. Several procedural alterations are also effected by the Second Schedule; it is not proposed to discuss those here. It is, however, important to note that paragraph (f) of the First Schedule to the Act of 1933 is now abolished; that was a provision enabling the landlord under certain circumstances to obtain possession on the ground of overcrowding. A landlord is still entitled to recover possession on that ground under the Housing Act, 1936; but by section 65 of that Act, actual possession so obtained by the landlord does not in any case effect a decontrol. Paragraph (h) of the First Schedule to the Act of 1933 is now amended to enable a landlord who purchased a house *on or before December* 6, 1937, and who reasonably requires it for occupation by himself or any son or daughter over eighteen years of age or his father or mother, to obtain an order for possession without proof of suitable alternative accommodation.

It is provided generally by section 8 (2) of the 1938 Act that expressions used therein have the same meanings as in the Act of 1933. Amongst other definitions of importance it is well to bear in mind always that the expression "dwelling-house" means, for the purposes of the Rent Acts, "a house let as a separate dwelling or a part of a house being a part so let" (section 16 (1) of the 1933 Act).

In conclusion attention should be drawn to the Rent Restrictions Regulations, 1938, which prescribe forms for notices of increase of rent, a form for insertion in rent-books, and a form of application for registration.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Settled Land Act—person having powers of tenant for life.—In *Re Gallinga Will Trusts*, [1938] 1 All E. R. 106, the question of section 20 (1) (viii) again arose. This provision entitles a person to estate ownership where he is entitled to the income "under a direction for payment thereof during his own or any other life whether or not subject to expenses of management or to a trust for accumulation of income for any purposes. . . ." The limitation under which the question arose was very complicated, but perhaps it will be sufficient to say that the trustees were given full powers of management to do repairs, etc., and subject thereto might in their discretion pay the income to certain ascertained persons and subject thereto the limitations were for life with remainders over. In the events which happened the income was paid to a person entitled under the discretionary trust, but the problem was whether the life tenant might be estate owner. It was unlikely that during the continuance of the discretionary trust he would in fact receive any income. Bennett, J., held that the interest of the life tenant was so unsubstantial that, following *Re Alston-Roberts-West's S. E.*, [1928] W. N. 41, he was not entitled to estate ownership, and consequently the legal estate would have to be vested in the trustees of the settlement under section 23 as statutory owners.

This sub-section has already given rise to difficulty. In *Re Llanover's S. E.*, [1926] Ch. 626, an heir-at-law was entitled for a period of lives under a resulting trust and was held entitled to estate ownership. In *Re Frewen*, [1926] Ch. 580, a tenant for life for one-third of the income, two-thirds of which was to be accumulated for repairs by the trustees, was held not to be entitled, and similarly in *Re Alston-Roberts-West's S. E.* (*supra*) a tenant for life subject to a discretionary trust was held not to be entitled.

Sale of land—lunacy—part performance.—*Broughton* v. *Snook*, [1938] 1 All E. R. 411, is an interesting case which reinforces the

law concerning the incapacity of mental unsoundness, and illustrates the doctrine of part performance. The plaintiff entered into a verbal contract to purchase an inn, but, at the vendor's suggestion, he did not pay the purchase money. The inn was let to a tenant, who, having found another inn fit for himself, with the knowledge and consent of the vendor allowed the plaintiff to go into possession. The plaintiff did certain alterations which the vendor approved. The vendor subsequently became ill and died. The personal representatives of the deceased repudiated the contract on the ground that by reason of age and infirmity the vendor could not have entered into the alleged contract. The plaintiff claimed part performance. Farwell, J., held that on the evidence, whether or not the vendor was not of sound contracting mind, the plaintiff had no knowledge of any defect of reason and that the contract could not be repudiated on that ground. The condition of the party must or should be known to the other party: *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599. With regard to the facts pleaded as part performance the plea of unsoundness of mind incapacitating consent must, in the view of the learned Judge, be also present to the mind of the person performing the acts of part performance, as in entering into a contract (see at p. 419).

With regard to the acts of part performance the learned Judge expressed a difficulty because the vendor had not been in possession and the plaintiff entered into possession at the request of the tenant, though with the knowledge of the vendor. It was possible that the expenditure could be referred to another cause than a pre-existing contract, though that would be hardly reasonable. The learned Judge, therefore, held that there were sufficient acts of part performance to evidence the verbal contract. He said (at p. 421): "In my judgment, 'necessarily referable to the contract' does not mean that the acts must be solely referable, because there may be some other explanation, however fantastic that explanation may be. The Court, in my judgment, has to look at all the circumstances, and has to determine whether, in all the circumstances of the particular case, the acts can be said to be necessarily referable to the contract."

Grant of water.—Beauchamp v. *Frome R. D. C.*, [1938] 1 All E. R. 595, throws further light on grants of water. In a grant of a farm the parcels contained the following grant: "together with the right as now enjoyed in common with others having the same right to the water supply to the hereditaments hereinbefore described through pipes from a spring." The supply was from a

spring through pipes from which a number of farms drew water by tapping at certain points to supply other points. The Master of the Rolls (Sir W. Greene) held that as a matter of construction the grant was to receive by means of the pipe all the water required at the farm subject to the fact that the grantees could get only what was left after the persons higher up the pipe line had taken what they wanted. The pipe line was acquired by the local authority who sought to increase the burden on the pipe line by tapping it higher up. The plaintiff claimed, through his predecessors in title under the grant, the right to resist further diminution of his supply. The Court of Appeal held that, though the plaintiff might be liable to submit to diminution from the existing branches from the pipe line, he was entitled to the residue of water from the existing pipe line without diminution by a new pipe line.

It was argued before the Court of Appeal that the grant was not valid as a grant on the ground that it was precarious and dependent upon the volition of others including the grantors. This argument may be supported by reference to the cases on implied grant : *Burrows* v. *Lang*, [1901] 2 Ch. 502; *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114; though these cases are not referred to in the report. In the latter case a tank had been filled from a spring and the overflow had been diverted into a defined channel. Subsequently the overflow was diverted after a grant of the tenement which had benefited. Lawrence, L.J., held that there was no implied grant. The basis of the decision would appear to have been that the alleged implied grant was not capable of subsisting as an easement on the ground that it was precarious.

No doubt these decisions must depend upon the precise facts of each case, but the rejection of the argument by the Court of Appeal in the case noted must, it is thought, throw some doubt upon the decision in the earlier case. The Court of Appeal held that this right could be validly granted, and presumably the only form in which it could enure for the benefit of the dominant tenement would be as an easement of water. It is submitted with respect that if it can be validly granted as an express grant it can equally validly subsist as an implied grant : cf. *International Tea Stores* v. *Hobbs*, [1903] 2 Ch. 165, and the other cases cited in this note.

Tenant for life—recoupment for payment of income charges.—*Re Warwick's Settlement Trusts* (noted *ante*, p. 173) has been affirmed in the Court of Appeal, but on the facts of the case. The Master of the Rolls differed from Farwell, J., in his view of the law

concerning the right to recoupment by the tenant for life, but held on the facts that there was no indication of an intention to claim a charge on capital. Clauson, L.J., did not express a concluded view on his agreement or disagreement with the opinion expressed by the Master of the Rolls, but he expressed a difficulty in agreeing. MacKinnon, L.J., expressed no view at all.

In the present state of the authorities, therefore, it is impossible to say more than that the general view of the law, on which the judgment of Farwell, J., was based, cannot be applied with certainty to income charges. It may be that a life tenant is not entitled to keep alive an income charge, but alternatively he may be. If he is, then it is certain that the facts must manifest an intention to keep such charge alive *at the date when* the payment is made and upon which the charge is based.

Compulsory acquisition for aerodrome—claim for injurious affection.—Owing to its obvious practical importance it is convenient to mention *University College, Oxford* v. *Secretary of State for Air* (1938), 54 T. L. R. 258, where it was held that, if land is compulsorily acquired for the purposes of an aerodrome, a claim for injurious affection of the remainder of their property may be made by the owners. The reason briefly given was the Defence Act, 1842, as applied in *Blundell* v. *R.*, [1905] 1 K. B. 516.

Mortgage—mortgagee's right to appoint receiver when in possession—non-compliance with conditions in collateral security. —*Refuge Assurance Co.* v. *Pearlberg*, [1938] 2 All E. R. 25, raises two interesting questions. A mortgage of land was secured by collateral mortgage of an insurance policy, which, however, was not referred to in the mortgage of the land. There was default in the payment of premiums and the mortgagee went into possession by an agent. Subsequently the mortgagee by deed appointed a receiver after the power of sale had arisen in respect of all the properties mortgaged. Simonds, J., held that default on the collateral security did not give rise to the exercise of the power of sale necessary to appoint a receiver under the Law of Property Act, 1925, s. 101 (1) (iii), but that after the power of sale had become exercisable a mortgagee in possession could appoint a receiver.

The facts of the case were very complicated and the case should

be read as a whole, since there were side issues, which, however, do not affect the general principles stated here. For example, the case is an interesting illustration of the rule, sometimes overlooked, that a deed takes effect from the date of signing and delivery and not from its expressed date : *Steele* v. *Mart* (1825), 4 B. & C. 272. The expressed date of the deed appointing the receiver was October 23, 1931, but the learned Judge held as a fact that the deed was not signed and delivered until nineteen days later, and that consequently the receiver, who had been in possession as purported receiver since October 23, was in possession as agent of the mortgagee, and hence the mortgagee must be treated as in possession.

With regard to the first principal point the learned Judge held that the sub-section of section 101 of the Law of Property Act could not cover default in one of two mortgage deeds as applicable to the other, each of which contained provisions deemed to be adequate and suitable for the different securities, without some express reference. This is a matter of some importance wherever a mortgage of land is supported by collateral security. The deed of assignment of the collateral security was expressed to be supplemental to the mortgage. This was insufficient to introduce the terms of the collateral security. Hence where default in the terms of a collateral security is to entitle the mortgagee to exercise his powers the collateral security should be embodied in the terms of the mortgage. It will be recalled that this is important in connection with all the usual powers of a mortgage for realising his security.

The right of the mortgagee to appoint a receiver when in possession is of considerable importance. A mortgagee in possession is not in a very happy position, because of his strict liability to account : see *White* v. *City of London Brewery* (1889), 42 Ch. D. 237. A receiver appointed by the mortgagee under his statutory power is, on the other hand, the agent of the mortgagor. Hence the burden of responsibility is shifted. It was for this reason that the Court in *Re Prytherch* (1889), 42 Ch. D. 590, was unwilling not only to allow a mortgagee to go out of possession, but to appoint a receiver in his place, though this was not the view taken in *Tillett* v. *Nixon* (1883), 25 Ch. D. 238, where the opinion was expressed that the statutory power could be exercised without coming to the Court, a view shared by P. O. Lawrence, J., in *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805.

It is certainly a peculiar result that a mortgagee may not go out of possession directly, but may relieve himself of liability by appointment of a receiver. This, however, is possible only where

the statutory power of sale is exercisable, *i.e.*, the mortgage money is in arrear for the appropriate period, etc. Normally this will give rise to no difficulty, but as this decision here noted shows the matter needs careful consideration.

This case has been approved in the Court of Appeal ([1938] W. N. 231), but no full report is available at the time of going to press.

Class gift—undivided shares—words of severance.—Re Froy, [1938] 2 All E. R. 316, is of interest primarily as a warning in the creation of class gifts intended to be held in undivided shares, whether of real or personal estate. This form of interest appears, if anything, to be increasingly common, particularly in gifts by will. In wills it is not always easy to determine whether or not a class gift is intended, but this is a question of construction whether the beneficiaries were meant to take as individuals or as a class : see *Kingsbury* v. *Walter*, [1901] A. C. 187, where mention by name of one member of the class was held not to prevent the gift operating as a class gift. The older authorities seem to suggest that a class gift can only be constituted where the beneficiaries have some family relationship to the testator, but there have been old cases in which this did not occur and the point is now very doubtful. Where, however, there is a class gift there is a rule of construction that if the class is compound of children and issue of deceased children there must be double words of severance if a tenancy in common is to be created in favour of the issue : see *Re Sibley's Trusts* (1877), 5 Ch. D. 494. In *Re Froy* (*supra*) the residuary gift was to be held, in the events which happened, upon trust " to be divided among his (the testator's) children then living or the issue of any deceased child ". The words " to be divided among " were clearly sufficient to create a tenancy in common for the children of the testator, but the question was whether the issue of a deceased child took as joint tenants. Simonds, J., followed the decision of Fry, J., in *Crosthwaite* v. *Dean* (1879), 40 L. T. 837, and held that the double words of severance are not necessary where there was a gift in shorthand such as there was in this case. In other words he held that it was not a true compound class, but a class with a superadded substitutionary clause in the case of the issue of the deceased child. This is the more to be noted, since the gift to be construed could only become effective on the death of one or more of the testator's children without issue. The point was that before such death without issue other children who had issue might have died and the intention was that the issue should

take such deceased child's share. To have held otherwise would have entitled the issue presumably to take equal shares with the living children which was excluded by the context. It is suggested that this must be the test to determine whether there is a shorthand substitutionary gift.

Restrictive covenants—benefit of land unsold.—In *Zetland* v. *Driver*, [1938] 2 All E. R. 158, the Court of Appeal overruled the decision of Bennett, J. (see note, *ante*, p. 72). The facts were set out in the previous note, but shortly the predecessor in title of the present plaintiff had sold part of his very large estate subject to a restrictive covenant. This covenant was broken but Bennett, J., held, following *Re Ballard's Conveyance* (noted *ante*, p. 74), that the area was so large that the whole could not get the benefit and, therefore, the covenant was not annexed to the land. The Court of Appeal (in a judgment of the Court delivered by Farwell, J.), held that as between the successor in title of the original grantor in respect of the whole of the remaining land and the grantee the covenant could be enforced. The judgment distinguished *Re Ballard's Conveyance* (*supra*) expressly refraining from any opinion on its accuracy, and again refused to express any opinion whether an express assignment of the benefit of the covenant to a grantee of part of the land retained would be effective to enable the grantee to enforce the covenant, except that such an assignment could be effective only so long as an original covenantee or his successors in title retained some part of the property.

The reason given (at p. 163) for distinguishing *Re Ballard's Conveyance* (*supra*) was "that in that case the covenant was expressed to run with the whole estate, whereas in the present case no such difficulty arises, because the covenant is expressed to be for the benefit of the whole or any part or parts of the unsold property". Assuming the accuracy of *Re Ballard's Conveyance* the result of this distinction would appear to be formulated thus: a restrictive covenant is enforceable by the successors in title of a defined area of land (and see *Re Heywood's Conveyance*, [1938] 2 All E. R. 230) or any part thereof remaining undisposed of although the area was so wide that the covenant was incapable of benefiting every part of the land to which it was annexed, and, *semble*, provided that it was not purported to run with the whole estate. The point of the proviso must surely be that an express assignment would certainly be unenforceable by the assignee of any part which was too remote to be capable of benefiting.

In any event, the requirement that there should remain in the hands of the original covenantee some part of the land retained obviously imposes a severe restriction. This restriction, for which no authority is cited, appears to be novel, and adds one more complication to this already over complex subject.

Actually the decision throws considerable doubt on the effect of *Re Ballard's Conveyance* (*supra*) and makes the technical phraseology of individual covenants of enhanced importance. It becomes increasingly obvious that few of the restrictive covenants, not imposed on in building schemes, contained in conveyances of any age, can now be enforceable. It may be convenient to note that in registered conveyancing where there is always a tendency to reduce phraseology, the problem may be more acute. Until recently the actual terms of the covenant were rarely inserted on the Register, and search will have to be made of the actual transfer at the Registry.

It is impossible in a note to do justice to the present state of the law and in view of its everyday importance arrangements have been made for the appearance in the next volume of a series of articles on the topic of restrictive covenants.

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2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Distress and hire-purchase—whether goods still comprised in agreement—reputed ownership.—In *Times Furnishing Co., Ltd.* v. *Hutchings*, [1938] 1 K. B. 775, there arose once more the vexed question of the position of goods hired to the tenant under a hire-purchase agreement, where the landlord levies a distress.

In this case the clause in the agreement relied on by the hire-purchase firm was : " This agreement, and the company's consent to the hirer's possession of the furniture comprised therein, shall automatically determine and come to an end . . . if any landlord of the hirer threatens or takes any step to levy a distress for rent upon the furniture of or in possession of the hirer."

In fact a distress was levied and goods in the possession of the hirer under the hire-purchase agreement were seized. The plaintiffs served a declaration under section 1 of the Law of Distress Amendment Act, 1908, and upon the goods being sold brought an action for illegal distress.

It will be remembered that the Act of 1908 gives protection to

the goods of persons who are not tenants of the demised premises and have no beneficial interest in any tenancy thereof; but by section 4 the Act does not apply, *inter alia*, to goods comprised in any hire-purchase agreement made by the tenant, nor to goods in the possession, order, or disposition of the tenant by the consent and permission of the true owner under such circumstances that the tenant is the reputed owner thereof.

It was held by Humphreys, J., that when the landlord took the first "step to levy a distress for rent" the agreement automatically determined by virtue of the clause referred to above. The goods were therefore no longer comprised in any hire-purchase agreement. The case is thus to be distinguished from *Jay's Furnishing Co.* v. *Brand & Co.*, [1915] 1 K. B. 458; 84 L. J. K. B. 867, where upon the construction of the particular contract it was held by the Court of Appeal that the agreement was not *ipso facto* determined by the landlord distraining; the chattels remained comprised in the agreement because there was still subsisting some contractual obligation under the agreement relating to the chattels. In *Times Furnishing Co., Ltd.* v. *Hutchings*, however, it was expressly provided that upon the specified event happening the agreement should automatically determine and come to an end, and so Humphreys, J., held that the contract had become absolutely void and the goods were no longer comprised therein. The case of *Smart Bros., Ltd.* v. *Holt*, [1929] 2 K. B. 303; 98 L. J. K. B. 532, rested upon somewhat different facts. There the hire-purchase firm had terminated the agreement by express notice under a clause in the agreement entitling them so to do, and it was by that method that the goods had ceased to be comprised in a hire-purchase agreement. The clause expressly provided that after such notice neither party should have any rights under the agreement. In the present case there was no question of any notice being given by the owner to terminate the hiring.

But while holding that the goods were no longer comprised in a hire-purchase agreement, the Court took a different view with regard to the position under the order and disposition clause of section 4 of the Act. Humphreys, J., held that "where goods have been in the 'possession, order, or disposition' of another party by the consent and permission of the true owner and the true owner seeks to establish that he has retracted that consent and permission, he must show that he has taken some steps to indicate his intention, and probably that he has taken some steps to recover the goods, so that no person can say that the tenant has continued to be the reputed owner of the goods, as he has been up to that time." The true owner must take steps to prevent

the reputed ownership continuing (see *Rutter* v. *Everett*, [1895] 2 Ch. 872, 878; 64 L. J. Ch. 845). Humphreys, J., therefore held that notice must be given or some other act done by the true owner to determine his consent to the goods being in the possession, order, or disposition of the tenant, and that the clause of the agreement referred to above did not operate so as to determine automatically that consent. The case therefore fell within section 4 of the Law of Distress Amendment Act, 1908, and the distress was legal.

Having regard to the strong and unequivocal terms used in the clause of the agreement in question, it would seem in view of this decision to be difficult if not impossible so to frame a clause in a hire-purchase agreement as to avoid the necessity for the true owner of the goods taking some active step to determine his consent to the hirer's possession, once a case of reputed ownership has arisen. It remains to be seen, however, whether any attempt will be made to draft a clause having a different effect.

Agricultural holding — compensation for disturbance — cost of employing surveyor or valuer.—In *Dunstan* v. *Benney and Others*, [1937] 4 All E. R. 510; 158 L. T. 34; 81 S. J. 1039, the landlord gave the tenants of an agricultural holding notice to quit upon the ground that they were not cultivating the holding according to the rules of good husbandry. It will be remembered that under section 12 of the Agricultural Holdings Act, 1923, one at least of the reasons enumerated in that section must be given in the notice to quit if the landlord wishes to avoid the payment of compensation for disturbance. Upon receipt of the notice the tenants called in a surveyor in order to refute the landlord's allegation.

Upon the expiry of the notice to quit, the tenants quitted the holding and claimed compensation under the Act. The arbitrator found that at the date of the notice to quit the tenants were cultivating the holding according to the rules of good husbandry, that they had suffered no loss or expense in connection with the sale or removal of their goods, farm produce or farm stock, but that they had incurred the expense of employing a surveyor or valuer to view the holding after receipt of the notice to quit in order to refute the landlord's allegation.

On behalf of the landlord it was contended that the tenants had suffered no loss, but had merely called a witness to prove that they had suffered a loss. It was argued that the expense of calling that witness was not sufficient to give them a claim for

compensation. The costs were incurred, not in leaving the holding, but in preparing a claim for compensation.

The Court of Appeal rejected this argument and held that the expense of employing a surveyor or valuer was in the circumstances an expense reasonably incurred in the preparation of their claim for compensation within the meaning of section 12 (6) of the Act. They were therefore entitled to compensation under the Act, although there was no other loss or expense directly attributable to the quitting of the holding. Sub-section 6 of section 12 expressly provides that the compensation payable to a tenant under the section "shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation)". The costs in question were incurred in order to dispute the landlord's contention that by reason of the alleged failure to cultivate properly no compensation at all was payable, and Greer, L.J., expressly held that it was reasonable for tenants to get in an expert at the time of the service of the notice to quit to provide the tenants with the means of meeting the landlord's allegation, which they would have to meet at the expiration of the notice. It must be remembered that the material time with regard to proof or disproof of the landlord's allegation is the date of service of the notice to quit.

"*Appurtenances*"—*land enjoyed with house.*—The word "appurtenances" does not extend to land which, though usually occupied with a house, is not within the curtilage of the house. In *Trim* v. *Sturminster Rural District Council*, [1938] 2 All E. R. 168; 54 T. L. R. 597, the Court of Appeal re-affirmed the principle that, broadly speaking, nothing will pass, in the case of a demise, under the word "appurtenances" which would not equally pass under a conveyance of the principal subject-matter without the word "appurtenances". To use the expressions used in the old case of *Bryan* v. *Wetherhead* (1623), Cro. Car. 17, the word "appurtenances" will pass with the house, the orchard, yard, curtilage and gardens, but not the land.

Rent within the meaning of Housing Act, 1936, *s.* 2—*rent paid inclusive of rates.*—The Housing Act, 1936, s. 2, which implies into contracts for letting small dwelling-houses a condition and

undertaking as to fitness for human habitation, only applies to houses let "at a rent not exceeding" £40 in the county of London and £26 elsewhere.

In *Jones and Jones* v. *Nelson*, [1938] 2 All E. R. 171, a case decided by Lewis, J., at Liverpool Assizes, the rent actually paid to the landlord was 12s. 6d. a week, but this included 3s. 8d. in respect of rates, leaving a balance of less than £26 per annum. It was held that the rent referred to in the Act was the rent exclusive of rates, and the condition of fitness for human habitation was to be implied. This decision is in accord with *Sheffield Waterworks Co.* v. *Bennett* (1872), L. R. 7 Ex. 409; 41 L. J. Ex. 233; affirmed (1873), L. R. 8 Ex. 196; 42 L. J. Ex. 121. In that case a local Act fixed the water rate by a graduated scale dependent upon the "rent" of the dwelling-house. It was held that rates paid by the landlord were to be deducted in determining the rent, "rent" here being equivalent to "annual value".

Construction of lease—distinction between payment of money as a method of performing a covenant and as a provision for its breach.—In *Moss' Empires, Ltd.* v. *Olympia (Liverpool), Ltd.*, [1938] 54 T. L. R. 575, an interesting point arose as to the construction of a lease. The defendants were assignees of a lease containing a covenant to spend £500 in each year on certain repairs. If less than £500 had been spent during the year the lessees were to pay the difference between £500 and what had been spent. It was provided that payment of the £500 should be full satisfaction of the clauses as to repairs, and that any excess spent in any year should be taken towards satisfaction of future liability for repairs. There was also a stipulation that the covenant to yield up in good repair should be deemed to have been carried out by the expenditure of £500 a year as provided.

It was contended by the defendants that this was either a mere collateral bargain for payment of a sum of money, which would not run with the land, or a covenant to pay a penalty for failure to perform the covenant to repair. The sum agreed to be paid could not be considered as liquidated damages for failure to repair, because the sum specified represented the cost of repairs undone and not the diminution in value of the reversion, which would be the measure of damages for breach of the covenant to repair (see Landlord and Tenant Act, 1927, s. 18).

It was pointed out, however, by Hilbery, J., that the clauses of the lease in question were not framed as provisions to meet

the case of breach of the covenant to repair, but on the contrary provided for performance of the repairing covenants in a particular way. It was an agreed method of fulfilling those covenants. The lessors were therefore entitled to recover in the action which they brought for the unspent balance of the £500 in respect of three years of the term; the action was an action on the covenant for the amount due thereon, and not an action for damages for breach of covenant or to recover a penalty.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Accumulations—annuities payable from the income of residuary estate—direction to accumulate surplus income during lives of annuitants—L. P. A., 1925, *s.* 164—*rule in* Saunders *v.* Vautier.—In *Re Blake, Berry* v. *Green*, [1938] 2 All E. R. 362, H.L., a testator devised his residuary estate to trustees upon trust to pay certain annuities out of the income therefrom. Some of the annuitants were individuals, others were institutions. The will prescribed that "on the death of the last personal annuitant" the annuities of the institutions should cease, and until they so ceased any surplus income from the residue was to be accumulated. The will proceeded: "Any deficiency in income in one year may be made up from the surplus income of any other year and subject as aforesaid I give the whole of my property after the death of the last personal annuitant" to the X charity. The income from the residue far exceeded the amount required to pay the annuitants. The X charity applied to the Court for an order that the residue be transferred to it subject to proper provision for the annuities: but the House of Lords, affirming the Court of Appeal (noted *ante*, vol. i, p. 371) refused to make the order requested.

The fact that the annuitants might, in case of a deficiency of income, resort to the surplus income of "any other year", showed that they were interested even in accumulations of past surplus income: hence the charity had no absolute right to the accumulations so long as any annuity continued. Moreover, although the Law of Property Act, 1925, s. 164, annuls the direction to accumulate so far as it relates to any surplus income arising more than twenty-one years after the testator's death, the charity is not entitled to such income; for the residuary gift was so worded as to operate only when all annuities have expired: such income,

therefore, is undisposed of, and passes as on intestacy to the heir or next-of-kin of the testator (he died before 1926). The rule in *Saunders* v. *Vautier* was inapplicable: other persons (the annuitants, and *semble* the heir and next-of-kin) besides the charity were interested in the accumulating income. Accordingly, the charity could not, without their consent, determine the trust to accumulate. Moreover, counsel's alternative contention, that the Court had a discretion to stop the accumulation and make the desired order, failed. Such an order would deprive the heir and next-of-kin of their right to take any surplus income produced after the statutory limit has put an end to the accumulation (*i.e.*, after twenty-one years). "Persons who take on intestacy have just as much claim to be protected in an administration by the Court as persons who are legatees."

This decision should be contrasted with *Wharton* v. *Masterman*, [1895] A. C. 186. There the facts were similar, but the annuitants' right to resort to surplus income from other years was expressly negatived by the will. Consequently the trust to accumulate surplus income was there intended solely for the benefit of the residuary legatees. They were therefore entitled (under the rule in *Saunders* v. *Vautier*) to stop the accumulation and to take surplus income at once—notwithstanding a clear intention to postpone them until the annuities expired. The expostulations of the testator's next-of-kin, who thereby lost the surplus income which, had the trust for accumulation stood, would have fallen to them when the statutory limit was reached (twenty-one years from the death), were of no avail. Although if the direction to accumulate had been irrevocable the statutory limit would have benefited the next-of-kin, the statute gives them nothing when (as under *Saunders* v. *Vautier*) the direction to accumulate is entirely ineffectual.

Administration—legacy of shares in company—company entitled to a "paramount lien" on the shares for a debt—equitable charge—Administration of Estates Act, 1925, *s.* 35.—Section 35 of the Administration of Estates Act, 1925, enacts that on the death of a person entitled to an interest in property "which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money)", that interest shall, as between persons claiming through him, be primarily liable for the payment of the charge; "and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the

whole thereof." In *Re Turner, Tenant* v. *Turner*, [1938] W. N. 155; [1938] 2 All E. R. 560, a testator bequeathed to his widow 10,000 of his ordinary shares in a certain private company. At the date of his death he held some 150,000 such shares and owed the company some £25,000. Under its articles the company had "a first and paramount lien upon the shares of each member for his debts to the company". Simonds, J., held, on the authority of earlier decisions, that such a lien amounts to an "equitable charge" on the shares, and so is within section 35 of the Act. The widow's legacy was therefore primarily liable, as against the residuary legatees, to bear a proportionate part of the debt due to the company. [There was no evidence here, be it noted, that the testator had signified in writing a contrary intention such as would exclude the section.]

Apportionment—tenant for life and remainderman—proceeds of sale of securities sold "cum dividend".—If stocks and shares forming part of a settled fund are sold "*cum dividend*", the tenant for life is thereby deprived of that portion of the prospective dividend which had accrued before the sale. The question therefore arises whether he (or his executor) should be paid something from the proceeds of sale to compensate him for this loss of income. Since the decision of Stirling, J., in *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241, the settled practice has been to pay him nothing in such a case, unless the circumstances are very exceptional. *Re Winterstoke's Will Trusts, Gunn* v. *Richardson*, [1938] 1 Ch. 158 (noted *ante*, pp. 271, 272), threatened to unsettle this general practice, for Clauson, J., there held that the trustees may pay to the tenant for life or his executor a sum equivalent to the lost dividend and, further, that they are bound to do so if the question is raised and there is no difficulty in ascertaining the appropriate sum. The matter has now been considered afresh by Farwell, J., in *Re Firth's Estate, Sykes and Lacey* v. *Hall*, [1938] 2 All E. R. 217, where trustees sold investments *cum dividend* shortly after the death of the life-tenant in order to pay death duties and distribute among the remaindermen. He declined to follow *Re Winterstoke's Will Trusts*, and said (p. 225): "In my judgment, it remains the position that in the ordinary case, apart from some very special circumstances, trustees are still entitled to follow the practice which has been followed for so many years, and I do not myself take the view that Clauson, J., is intending to adopt some novel practice which had not hitherto been the practice at all. . . . I am

certainly not going to say anything to suggest that apart from some special circumstances, the trustees have to come to the Court. . . . In my judgment they may safely act on the practice as it is, in the absence of some special circumstances or some special claim by the legal personal representative of the tenant for life." Apparently he read the *Winterstoke Case* as deciding that, if there is no difficulty in calculating what proportion of the price represents the lost fraction of dividend, this is a " special circumstance " which will alter the situation. But, as he points out, there is no logical reason why the simplicity of the calculation should give to the tenant for life an equity which he would not otherwise have. Moreover, since in the present case the calculations were likely to be difficult, the *Winterstoke Case* was distinguishable.

Will—construction—perpetuity—discretion restricted to " the limitations prescribed by law "—rule against double portions—effect on partial intestacy before 1926.—The facts of *Re Vaux*; *Nicholson* v. *Vaux*, [1938] W. N. 145; [1938] 2 All E. R. 177, may be summarised as follows. Subject to a life interest to his widow, the testator directed his trustees to set aside from his residuary estate £20,000 for each of his two daughters, to be settled upon them in the usual way. As to the remainder of the residue, (i) clause 11 of the will directed the trustees to hold it upon trust to apply both the income and capital thereof, in such shares as they should think fit, for the benefit of any one or more of his children or the issue of any deceased child; and (ii) clause 12 empowered them to deal with the capital and income thereof for the benefit of his children or grandchildren at their sole discretion " save only that all such dealings shall be within the limitations prescribed by law ".

It was admitted before Simonds, J., that clause 11, if taken alone, infringed the rule against perpetuities; for the will defined " trustees " to include trustees for the time being whether original or substituted, and purported to give them a discretion exercisable among prospective issue of the testator's children. It was argued, however, that clause 12 limited clause 11 to the period " prescribed by law ", and alternatively that clause 12 was itself an independent and effective disposition. As to this, Simonds, J., construed clause 12 as a particular authority falling within the larger ambit of the trust created by clause 11. It was therefore incapable either of restricting the remoteness of clause 11 or of standing alone. He also stated, *obiter*, that even were it indepen-

dent it would infringe the perpetuity rule, since (unlike *Pownall* v. *Graham*, 33 Beav. 242) there was no context to show precisely what life or lives in being the testator had in mind. The limiting words, quoted above, were therefore void for uncertainty. Accordingly, both clauses were void; and the residue, subject to the bequests to the widow and two daughters, devolved upon the testator's next-of-kin (he died in 1925)—*viz.*, his widow, the two daughters, and two sons.

A further question arose. After making his will, the testator had settled, by an *inter vivos* settlement, 2,000 6 per cent. preference shares in a private company upon each of his four children. Simonds, J., held, therefore, that the legacies to the daughters were thereby adeemed *pro tanto* by the operation of the rule against double portions. Although the terms of this settlement differed slightly from those of the settled legacies, no objection was raised on this ground. The points taken were (i) that shares or stock are so different in character from a money legacy that one ought not to presume that the one was intended to adeem the other; and (ii) that the value of shares or stock in a *private* company is difficult to ascertain. The learned Judge held, however, that neither argument ousted the presumption against double portions, and that there was nothing in the will inconsistent with its application. A further unsuccessful argument raised on this matter was that here, the ultimate gift of residue being void, an ademption of the daughters' legacies would merely serve to increase the shares of the next-of-kin under the resulting partial intestacy. This objection, founded on analogy to the rule that before 1926 persons claiming under a partial intestacy were not bound to bring legacies or other advances into account (see *Re Roby*, [1908] 1 Ch. 71), failed. Consequently, the *pro tanto* ademption of the daughters' legacies operated to increase the shares of residue taken by the two daughters and two sons as next-of-kin. The testator's widow, though one of his statutory next-of-kin, was not permitted to benefit from this accretion to the residue; for the rule against double portions should only be allowed to benefit children and persons towards whom the testator stood *in loco parentis*. Indeed, despite certain *dicta* in *Meinertzagen* v. *Walters*, 7 Ch. App. 670, the learned Judge felt able to "decide" (presumably *obiter*) that the rule ought not to benefit a stranger even if he be sole residuary legatee.

4. *INCOME TAX CASES.*

By L. J. STEIN, Barrister-at-Law.

Tax free annuities—immunity from surtax.—There is a series of familiar decisions, beginning with *Re Crawshay*, [1915] W. N. 412, as to the tests to be applied in determining whether a tax free annuity carries with it immunity from surtax. Another well-known group of decisions, beginning with *Re Bowring*, [1918] W. N. 265, is concerned with the principles on which the immunity from surtax, where it exists, is to be quantified. Both questions came recently before Farwell, J., in *Re Horlick's Trusts; Colledge* v. *Horlick*, [1938] 2 All E. R. 553. In connection with the dissolution of a marriage, the husband covenanted in 1930 that he or his personal representatives would during the life of the wife pay annually to trustees in trust for the wife "such a sum as after deduction of income tax at the standard rate for the time being in force *and of every other tax on income for the time being in force* shall leave a clear sum of £4,000 . . . The said yearly sum shall be paid in advance by equal quarterly instalments on the usual quarter days . . .". It was further provided in the Deed that certain securities should be held by the trustees for securing the annuity, but that the settlor should have power to require the release of those securities on paying to the trustees "such a capital sum as will at the time of such payment produce by its income *after the deduction of income tax and such other taxes on income as aforesaid* the clear annual sum of £4,000 . . .".

Apart from the annuity, the wife had only about £400 a year of her own. Until her re-marriage, the settlor paid the annuity of £4,000 without deduction of tax and also discharged the wife's surtax liability. On the wife's re-marriage it was agreed between her and the settlor that he should pay, in respect of her surtax liability, an amount computed by reference to the surtax with which she would be chargeable if she were a *feme sole* assessable only on the amount of the annuity plus her small income from other sources; in other words, the computation was not to be made by reference to the wife's proportion of the surtax actually payable on the combined incomes of the wife and her husband. But this was admittedly a personal arrangement between the wife and the settlor, and on the settlor's death the wife called upon his executors to provide the full amount of her proportion, so far as attributable to the annuity, of the surtax actually payable on the combined amounts of her husband's income and her own.

The executors' first contention was that, on the true construction of the Deed, they were under no liability at all in respect of surtax. *Prima facie*, the word "deduction" in the Deed spoke strongly in their favour, for this expression is clearly inapt in relation to surtax (see *Re Crawshay*, above; see also *Re Bates*, [1925] Ch. 157). The executors also invoked, in support of their contention, the provision in the Deed for the payment by the settlor to the trustees of a capital sum of such amount as would at the time of payment produce the clear annual sum of £4,000; if the annuity was to be free of surtax as well as standard rate tax, the fixing of the capital sum would present an almost insoluble problem. The learned Judge pointed out, however, that, on the true construction of the Deed, the payment over to the trustees of the capital sum would not relieve the settlor of his personal liability; all that was really provided was that in place of certain investments which, under the provisions of the Deed, were to be placed in the hands of the trustees for securing the annuity, the settlor might substitute a capital sum of an amount to be measured in the manner prescribed by the Deed. A point was also made of the provision for the payment of the annuity by equal quarterly instalments—a requirement which, literally construed, seemed inconsistent with the view that the annuity was to be free of surtax, since immunity from surtax in respect of the annuity for any given year could only take the form of a supplementary payment to or for the benefit of the wife when the surtax liability for that year had been quantified. This contention, however, was not of itself conclusive, since there are reported cases in which the language used has been construed as giving immunity from surtax, notwithstanding that the annuity has been made payable by quarterly instalments—see, for example, *Re Doxat*, [1920] W. N. 262; *Re Bowen*, [1925] W. N. 206. Nevertheless, the fact remained that the immunity from tax was twice over expressed in the Deed in terms of deductions, and the decision would clearly have had to be in the executors' favour if the Deed had merely provided for the payment of such a sum as would after deduction of income tax leave £4,000. But the actual words of the Deed were: "After deduction of income tax at the standard rate . . . *and of every other tax on income for the time being in force.*" The learned Judge took the view that some meaning must, if possible, be given to the words "every other tax on income", and it was, in his opinion, impossible to give those words any intelligible meaning unless they were taken to refer to surtax. He pointed out that there was no decided case in which the language to be construed was exactly the same, so that he was not precluded

by authority from deciding in favour of the wife. His conclusion was that the annuity must be taken to be free of surtax as well as standard rate tax, the paramount consideration being that effect must be given to the intention of the parties as disclosed by the Deed; the infelicitous wording of certain of its provisions was not sufficient to negative the inference to be drawn from the express reference to taxes on income other than standard rate tax.

This point having been reached, the only question which remained was as to the manner in which the immunity from surtax was to be quantified. The wife's re-marriage had, by causing her income to be combined, for purposes of assessment, with the income of her husband, resulted in the surtax attributable to the annuity being substantially more than it would have been if she had remained a *feme sole*. The learned Judge, however, decided that he was bound by authority (see *Re Bowring*, above) to hold that the executors must pay, in respect of surtax, an amount computed by reference to the amount of the annuity expressed as a proportion of the joint total incomes of the wife and her husband, and to the amount of the surtax which was on that basis attributable to the wife in respect of her annuity.

Income from foreign securities—deduction of foreign tax.—The Rules of Case IV of Schedule D, which deals with income from foreign securities, provide that the computation shall be made after the deduction (*inter alia*) of " any sum which has been paid in respect of income tax in the place where the income has arisen ". Is the foreign income tax which may be deducted to be confined strictly to tax on the income in respect of which the Case IV assessment is made? This question was answered in the affirmative by the Court of Session in *Scottish American Investment Co.* v. *C. I. R.*, Tax Leaflet No. 952; 17 A. T. C. 49. An investment company was chargeable to British income tax on the income of certain American securities. Its profits and losses on the realisation of investments, which were disregarded in ascertaining its liability to British income tax, were taken into account in ascertaining its liability to income tax in the United States. The company claimed as a deduction in computing its income for the purposes of the Case IV assessment the whole amount of the American tax. As is not surprising, this claim was rejected on the ground that the deduction to be made in computing the income assessable under Case IV is a deduction of the amount paid in the place where the income has arisen in respect of income tax *on such income*.

Annual value—rent including amount of insurance premium.—A short but interesting point as to the ascertainment of annual value for the purposes of Schedule A came recently before Lawrence, J., in *House Property and Investment Co., Ltd.* v. *Kneen*, Tax Leaflet No. 962. The lease of certain premises provided for a rent of £104 per annum and for a payment by way of further rent of £1 per annum, representing the amount of an insurance premium payable by the lessor. Though the amount at stake in this particular case was negligible, the lessors raised a question of principle by contending that in arriving at the annual value of the property the "further rent" representing the insurance premium must be disregarded. In rejecting this contention, the learned Judge pointed out that Rule 8 of No. V of Schedule A, relating to what are commonly described as maintenance claims, makes express reference to (*inter alia*) the cost to the owner of insurance. Rule 8 is clearly supplementary to Rule 7 and designed to correct any insufficiency in the "authorised reduction" under that Rule. It follows that the reduction authorised by Rule 7 must likewise be taken to be a reduction in respect of (*inter alia*) the cost of insurance. If, then, a "further rent" payable by the lessee to cover the amount of the insurance premium were to be ignored in arriving at the annual value, the amount from which the authorised reduction fell to be made would be an amount excluding the cost of insurance, notwithstanding that the cost of insurance was allowed for in the authorised reduction itself, or in that reduction as supplemented, if the prescribed conditions were satisfied, by a repayment of tax under Rule 8. The decision is in harmony with the observations of Channell, J., in *Turner* v. *Carlton*, 5 T. C. 395, where a similar point arose but was not required to be conclusively decided.

Foreign dividends—relief from double taxation.—The decision in *Barnes* v. *Hely Hutchinson*, 16 A. T. C. 363, discussed in *The Conveyancer* for December, 1937 (pages 186—187), has now been affirmed by the Court of Appeal—see *The Times* newspaper, June 3, 1938.

Agreed payment on termination of service—assessability of executors where service terminated by death.—The decision in *Allen and Murray* v. *Trehearne*, 16 A. T. C. 87, discussed in *The Conveyancer* for December, 1937 (page 187), has now been affirmed by the Court of Appeal—see [1938] 2 All E. R. 698.

5. *DEATH DUTY CASES.*

By L. J. STEIN, Barrister-at-Law.

Estate duty on life policy money—policy partly kept up for benefit of donee.—The effect of section 2 (1) (c) of the Finance Act, 1894, read together with the relevant portion of section 11 of the Customs and Inland Revenue Act, 1889, is that where a policy of assurance effected by a deceased person on his life was partially kept up by him for the benefit of a donee, there shall, for estate duty purposes, be deemed to pass on his death a part of the policy money "in proportion to the premiums paid by him". In *Lord Advocate* v. *Fleming*, [1897] A. C. 145, the House of Lords decided that policy money was not caught by section 11 of the 1889 Act where X, having effected an insurance on his own life and paid the premiums up to a certain point of time, then assigned the policy to Y, and after the assignment the premiums were wholly paid by Y. This was a simple case of the premiums after the assignment being wholly paid by the donee. The decision left open the question of the proportion to be taken where the deceased, having paid the premiums up to the assignment, paid part but not all of the premiums after the assignment. In *Att.-Gen.* v. *Meech*, 15 A. T. C. 619, X, having effected a policy on his life and paid the initial premium, assigned the policy to Y. Thereafter nine premiums were paid by X and the tenth and last premium by Y. The Crown succeeded in its claim to include nine-tenths of the policy money in the property deemed to pass on X's death, *i.e.*, a fraction computed by reference to X's proportion of the post-assignment premiums, and not by reference to his proportion of the total premiums, in which case the figure would not have been nine-tenths but nine-elevenths. The view taken by Rowlatt, J., in *Att.-Gen.* v. *Meech* was questioned in the Scottish Courts in *Lord Advocate* v. *Inzievar Estates*, 16 A. T. C. 458, but the House of Lords has now reversed the Scottish decision and set at rest the doubts to which it gave rise (*The Times* newspaper, April 13, 1938). The facts in the *Inzievar Estates* case were as follows: The total number of premiums paid since the policy was effected was twenty-five. Of these, eleven had been paid after the assignment, and of these eleven, four had been paid by the deceased and the balance by the donee. The Court of Session held that the proportion of the policy money deemed to pass on the death was four twenty-fifths, or, in other words, that the post-assignment premiums paid by the deceased must be

measured against the total number of premiums paid since the policy was effected. The House of Lords, reversing this judgment, has now decided in favour of the alternative view that the premiums paid by the deceased after the assignment must be measured against the total number of post-assignment premiums, the proportion of the policy moneys deemed to pass being, therefore, not four twenty-fifths but four-elevenths. The view expressed by Rowlatt, J., in *Att.-Gen.* v. *Meech*, above, has thus been authoritatively confirmed.

Cesser of widow's annuity — testator domiciled in Northern Ireland—at annuitant's death estate partly invested in England.— The decision in *Re White*, [1938] W. N. 57, discussed in *The Conveyancer* for March, 1938 (pages 282—283), has now been affirmed by the Court of Appeal—see [1938] W. N. 207.

THE LIBRARY.

ENCYCLOPÆDIA OF THE LAWS OF ENGLAND. Third edition. Editor-in-Chief: E. A. JELF, Esq., Senior Master of the Supreme Court and King's Remembrancer. Vol. I ("Abandonment of Action" to "Avowry") with an Introduction by Master E. A. Jelf. xxviii + 710 pp. London: Sweet & Maxwell, Ltd. Edinburgh: W. Green & Son, Ltd. London, Liverpool, Birmingham, Glasgow: The Solicitors' Law Stationery Society, Ltd. 1938. £2 10s. net.

The joint publishers are to be warmly congratulated on their decision to issue a third edition of this tried and valuable work. The first volume appeared on March 31 last; succeeding volumes will follow at regular periods until the whole new edition is complete. In order that the work may be kept up to date, moreover, the publishers promise us periodic cumulative supplements. Another new feature yet to come, which will be awaited with excitement and impatience, is a complete volume devoted to critical legal biography, including a list of the English Judges from the Conquest to 1937.

Both the first edition, published in 1897, and its successor, published in 1906, had a great success, which will certainly be

repeated in the case of the edition the issue of which has just begun. The work represented, from its inception, something quite new and different in the *apparatus* of the English lawyer; Scotland is lucky in having a parallel Encyclopædia of her own law. Practitioner, teacher, writer and student alike, in both countries, enjoy an inestimable advantage in possessing sources of information at once complete, scholarly, and concise, as are the two Encyclopædias.

The ordinary specialised text-books of law would doubtless be classified by Charles Lamb, were he alive to study them, among the *biblia abiblia* at which he mocked; nor would he have spared, one fancies, the great encyclopædic compilations which are, in effect, no more than a number of specialised text-books arranged in alphabetical order. To this assembly the Encyclopædia of the Laws of England does not belong, and Elia might well accord it different treatment. There is a humanism about it of which he would have approved. For here is much more than the mere working tool of the practitioner concerned with everyday affairs in chambers or office; here is something learned, scholarly, with strong historical leanings, which commemorates the past as well as expounding the present, which has regard to the art and science of the law as well as to its practicalities.

Not that the workaday necessities are neglected: here in convenient form the practitioner can quickly find what he else might search for fruitlessly or for a long time. The object of the work is to embody, in a lucid and easily ascertainable manner, the law as it is and as it was on any subject; the intention is to give a sharp, bird's-eye view, and this must be of the greatest value to the specialist as well as to the layman. The excellence of the first volume, now before us, is proof that the object has been handsomely achieved.

There is a two-fold difficulty about reviewing a work of this kind. One does not know quite where to begin; having begun, one is beguiled by one title to another until one does not know where to stop. What is one to select for notice, and what to overlook? For one cannot cover the whole ground. Curiosity, in the first place, sends one to the titles which are so unusual and queer that even the most learned are like to be puzzled. Who can resist dipping into the book to find out what "Arabia" is doing in this galley, or decline the invitation to graze in pleasant and unfamiliar fields such as "Aisle", "Aid by Verdict and Prayer", "Ad Melius Inquirendum", and "Abatement of Freehold"? This tendency must, however, be resisted. Let us turn rather to "Abstract of Title", "Accord and Satisfaction",

" Adverse Possession ", " Agricultural Holdings ", " Arbitration ", and other familiar pastures, and see what the learned compilers have to say. In the present volume there appear to be some forty or fifty articles of immediate interest to conveyancers and property lawyers.

The article on " Adjoining Owners ", running to some four and a half pages, is contributed by Mr. T. M. O'Callaghan; it covers, in concise form, the learning on the subject which has collected round the provisions of the Lands Clauses Acts as to disposal of superfluous lands, section 150 of the Public Health Act, 1875 (as to streets), and the London Building Act, 1894; it deals further, in brief, with Right to Support (with cross-references to " Easement ", " Prescription " and " Support ") and with Fences and Boundaries. It is a good example of the method of the work, and it appears to be well done. Mr. A. K. Kiralfy contributes a useful and concise article of about two pages on " Agreement " which deserves study. The article on " Agricultural Holdings " (by Mr. N. H. Moller) runs to nearly thirty-nine pages, and that on " Agricultural Marketing " (by the same author) is some ten pages long; the former is an admirably concise, but nevertheless sufficient, exposition of a subject by no means free from difficulties; the latter deals with a branch of law which has only recently come into existence, though some fifteen cases under the Acts are referred to in the article.

There was an article on " Air " in the second edition, but developments since then have necessitated supplementing articles on " Air Force ", " Air Ministry ", " Air Navigation " and " Aerodromes "; under the principal article are grouped a diverse series of discussions—Sovereignty, Trespass, Free Passage and Purity—which make very interesting reading. A somewhat melancholy interest attaches to two articles in the present volume, " Abdication " and " Air Raid Precautions ". There is a fifteen-page article on " Allotments ", and a valuable short discussion of " Alluvion ". Mr. W. Gutch's exposition of " Annuities " appears to be particularly good. Professor D. Hughes Parry contributes a useful article on " Assets " and Sir Charles Odgers is responsible for a helpful essay on " Assignment of Choses in Action ", though the value of the section on Assignment of Part of a Debt would have been enhanced by a reference to *Williams* v. *Atlantic Assurance Co.*, [1933] 1 K. B. 81, which, it is respectfully submitted, decides that part of a debt is not within section 136 of the Law of Property Act, 1925. An omission from " Abstract of Title " appears to be the absence of any reference to abstracts of title in sales and mortgages of reversions and similar interests in

property, which will doubtless be supplied when we have the article on Reversions; in other respects this article is admirable.

This brief account of some—only a small part—of the contents of the volume under consideration is all that the nature of the work and the space here available permits in the way of detailed review. It is, however, quite clear that Master Jelf and his team of learned contributors (which includes, we are glad to note, the magazine editor of this journal) are to be congratulated on having maintained the high standard set by the two former editions, and on having in many respects surpassed it. Those who already possess the second edition will require no further encomium to persuade them to replace it with the third edition. To those to whom the work is not yet familiar—practitioners and teachers of the law especially—it is strongly recommended that they should add it to their shelves. For the rest, this is a unique work of reference which no general library of importance can afford to be without, as well as a monument of erudition, industry, and practicality.

P. FORES.

PLANNING LAW FOR TOWN AND COUNTRY. By DESMOND HEAP, LL.M., Prosecuting Solicitor to the Corporation of the City and County Borough of Leeds, etc. With an Introduction by Sir RAYMOND UNWIN. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. 1938. pp. xx + 208. Price 12s. 6d.

The increasing importance of town and country planning to practitioners makes welcome a connected dissertation on the law. No doubt there are many occasions when annotated Acts are very helpful, but short introductory dissertations do not always really assist in giving that connected survey which is an essential to a proper grasp of the subject as a whole. The present volume is a succinct and very lucid account of the subject as a whole, bringing together all the relevant provisions under their appropriate heads. The learned author has added certain expressions of opinion and criticism which add to the interest of the book. The book does not contain by way of appendix or otherwise the sections of the Act and in this the reviewer thinks there is wisdom. These Acts are readily accessible and it is usually more convenient to consult them independently of a text-book, while the additional cost of printing certainly does not justify their incorporation. While the book can hardly within such a compass claim to be exhaustive on every detail it is thought that here is a useful manual which should be studied

by all those who have occasion frequently to meet this branch of the law. It can also be referred to with advantage for any point that arises, though direct reference to the statute may also prove to be necessary.

INTRODUCTION TO THE PRINCIPLES OF LAND REGISTRATION. By Sir JOHN STEWART STEWART-WALLACE, C.B., Chief Land Registrar. London : Stevens & Sons, Ltd., 119 & 120 Chancery Lane, W.C.2. 1937. pp. viii + 93. Price 5s.

This book is based upon certain lectures to the Institute of Bankers in London, but it also contains a chapter on the Land Charges Register under the Land Charges Act. Anything which the learned Chief Registrar writes or says concerning the Registry is worthy of the closest attention by all conveyancing practitioners, whether or not it was addressed in the first place to lawyers.

From a purely practical point of view the three most interesting chapters, perhaps, are those on official searches in the Registry, the relation of land registration to maps and plans, and on the Land Charges Register. On the other hand, the book as a whole is an apologetic for the system of registered conveyancing as it stands at present, and as such it is far more than a matter of empirical interest. It is believed that a large majority of practitioners are still unfavourable to registered conveyancing generally as an alternative to unregistered conveyancing. In these circumstances it behoves all practitioners to acquaint themselves with the arguments on its behalf, and this book can be commended as being by the person best qualified to state the case. This is not to say that the reviewer agrees without reservation with the case stated. He thinks that the difficulties inherent in unregistered conveyancing are overstated and the freedom from technicalities of the system of registered conveyancing underestimated. The learned Chief Registrar appears to contrast the more difficult cases of unregistered titles with the most simple case of a transfer of the whole title in registered conveyancing. Nor can the reviewer accept wholeheartedly the argument that registered conveyancing is so much cheaper owing to the scale of costs and Registry charges, or the view that it would be too expensive to register overriding interests and define boundaries, thus throwing upon the practitioner the burden of overcoming these difficulties, which are generally admitted to be among the commonest and most obstinate, often for reduced remuneration. This would seem to cast the burden

of expense primarily upon the profession. The reviewer must not be thought to underestimate the practical value of this little book. It is not, of course, a general survey of all the principles of registered conveyancing in the form of a practical treatise, but there is in it much of great use to the practitioner as such. It is repeated that all practitioners are recommended to read it, and that more than once.

THE SETTLED LAND ACTS. By J. C. ARNOLD, LL.B., of the Inner Temple, Barrister-at-Law. London : Sir Isaac Pitman & Sons, Ltd. 1937. pp. xxii + 384. Price 25s.

This work contains a general introduction of ninety-six pages divided into chapters explanatory of the system of the creation of settlements, the powers of estates, and the rights of third parties such as mortgagees and purchasers, followed by an annotated text of the Act and by a section of notes on probate grants of settled land. The introduction is clear and succinct and is a good summary of the principal contents of the Act. The notes to the text are well expressed and appear to be both accurate and up-to-date as well as reasonably full. The note on probates is a useful exposition of the present position with regard to special grants.

There is no doubt that the Settled Land Act, 1925, plays a greater part in conveyancing than its predecessor of 1882, primarily because it requires certain formulæ to be adopted in all cases of settled land, when formerly resort was had only to the Act if it was necessary to exercise powers under it. It is thought that in practice the provisions of the Act are more frequently overlooked than should be the case. This arises often because the Act applies to many instruments where there is no settlement in the old-fashioned implication of the term. For those practitioners who have no copy of *Wolstenholme & Cherry's Conveyancing Statutes*, and find the general principles of those Acts sufficiently stated in their conveyancing and other text-books, this annotated text would be most useful, and a careful study of the introduction would put them on guard against omissions to seek further information in the notes to the Act itself. Whether an isolated work on the Settled Land Act alone is really the best method of treatment is a doubtful question, but it seems to the reviewer that the Settled Land Act presents a very incomplete statement of the law of settlements as a whole, and that really if practitioners need a work on settlements it should be on that subject and not confined to the Act.

EVERSLEY'S LAW OF THE DOMESTIC RELATIONS. Fifth Edition. By ALEXANDER CAIRNS, of the Middle Temple and the Northern Circuit, Barrister-at-Law. 1937. London: Sweet & Maxwell, 3 Chancery Lane. pp. lv + 884. Price 47s. 6d.

"Eversley" is one of the books which deserves to be better known among practitioners than it is. It is concerned with rather a miscellaneous collection of topics, which are not usually treated as a whole, and consequently are apt to be scamped in one or other part as outside the scope of the work dealing with other parts of the subject. This is due in some measure to the failure of English law to have any composite subject under the heading of "status" to be found in Continental systems based on Roman Law. Eversley is not, of course, a work on the whole of the English Law of status, but that part of it which concerns the private individual excluding in all its forms the law of corporations. Shortly, it concerns the law of husband and wife, parent and child, guardian and ward, infants, and master and servant. The value of the work, which can be seen from its size to be very full in treatment, lies in the fact that it gives adequate attention to each branch of the topic treated. So, for example, on the subject of husband and wife the learned author is not only concerned with divorce and separation, though both these are dealt with, including a section on separation deeds, but also with a very full treatment of the law of formalities of marriage, marriage settlements, the rights in the property of spouses, personal rights against one another, actions by and against one another, and contracts by married women. While all these matters can be found to a greater or lesser extent, the value of a connected treatise is obvious. The same method is, of course, to be found adopted with regard to the other topics mentioned, some of which are even more elusive to find in more general works. It should, however, be said that the section on Master and Servant is designed, apparently, primarily, in relation to domestic servants, and contains much useful information on that head. It does not concern itself with the wide mass of law, particularly the statutory law, which has grown up round this subject in the last few decades. For completeness, at least, such matters as liability for health insurance and compensation in respect of domestic servants should receive attention.

Nevertheless this book is a valuable addition to any working library.

We have also received the following books :—

THE LAW OF MORTGAGES. By H. G. HANBURY and C. H. M. WALDOCK, Barristers-at-Law. 1938. London : Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. pp. xl + 502. Price 25s. net.

A GUIDE TO LAND REGISTRY PRACTICE. By JOHN J. WONTNER. Fourth Edition. 1938. London : The Solicitors' Law Stationery Society, Ltd. pp. xi + 234. Price 10s. 6d. net.

PRECEDENTS

Form 1.

Assignment of Leasehold Premises Forming Part of Partnership Assets by a Surviving Partner and the Executors of a Deceased Partner to a Company Formed to Take Over the Partnership Business (*a*).

Drafted by Sidney Kaye, LL.B., Solicitor, of Huddersfield.

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Trustee") of the first part B of *etc.* and C of *etc.* (hereinafter called "the Executors") of the second part and —— and Company Limited whose registered office is situate at —— (hereinafter called "the Company") of the third part Parties.

WHEREAS— Recitals:

(1) THE Trustee and Z were at the date of the death hereinafter recited of the said Z entitled to the leasehold premises described in the First Schedule hereto for all the residue now unexpired of the term granted by the hereinafter-mentioned lease as joint tenants upon trust for sale and to hold the net proceeds of sale in trust for themselves according to their partnership rights therein as tenants in common subject to the indenture of mortgage and further charge (hereinafter called "the said mortgages") specified in the Second Schedule hereto and to the principal moneys and interest thereby secured but otherwise free from incumbrances Title of partners;

(2) THE said Z duly made his will dated the —— day of —— 19— whereby he appointed the Executors to be executors thereof will of partner;

(3) THE said Z died on the —— day of —— without having altered his said will which was duly proved by the Executors in the Principal Probate Registry on the —— day of —— death of partner;

(*a*) Stamp, *ad valorem*, unless full duty paid on agreement for sale.

partnership business;

(4) For some time prior to the death of the said Z the said Z and the Trustee carried on business as —— in partnership at —— aforesaid and the said property hereinafter mentioned was an asset of the said partnership

formation of company to carry on business;

(5) The Company was on the —— day of —— incorporated under the Companies Act 1929 as a private company with a capital of £—— divided into —— Ordinary Shares of £1 each for the purpose of acquiring and carrying on the said business

agreement for sale to company.

(6) By an agreement dated the —— day of —— made between the Trustee and the Executors of the one part and the Company of the other part the Trustee and the Executors agreed with the Company for the sale to it of the said business and the assets thereof (including the said property hereinafter described) other than book and other debts belonging to the Trustee and the Executors for the sum of £x (which said sum was apportioned so that the value of the said property hereinafter described should be the sum of £y) payable as to £z in cash to the Executors and as to the balance thereof by the allotment and issue to the Executors or their nominee of —— shares in the capital of the Company and the allotment and issue to the Trustee of —— shares in the capital of the Company each credited as fully paid up

(7) The said consideration has been duly paid or satisfied as the Trustee and the Executors hereby acknowledge

Testatum.

Now this deed witnesseth as follows:—

1. In pursuance of the said agreement and in consideration of the cash so paid and the shares so issued as aforesaid the Trustee as beneficial owner in respect of his share therein in equity and the Executors as personal representatives in respect of the remaining share therein to which the said Z was beneficially entitled hereby respectively assign and the Trustee as surviving joint tenant and as such trustee of the legal estate in the entirety by direction of the Executors hereby assigns and confirms unto the Company

All and singular the hereditaments and premises described in the Schedule hereto

Habendum.

To hold the same unto the Company and its assigns for all the

residue now unexpired of the term of years granted by a lease dated —— SUBJECT to the yearly rent of £—— thereby reserved and to the performance and observance of the covenants on the lessee's part therein contained AND SUBJECT ALSO to the said mortgages and all interest fines subscriptions and other moneys thereby secured BUT FREED AND DISCHARGED from the said trust for sale and all right or interest of the Trustee or the estate of the said Z therein.

Covenant to pay rent.

2. THE Company hereby covenants with the Trustee and the Executors and as a separate covenant with each of them that it will henceforth pay the rent reserved by the said lease and observe and perform the covenants and conditions contained in the said lease and on the lessee's part to be observed and performed And will at all times hereafter keep the Trustee and his estate and effects and the Executors and their respective estates and effects and the estate and effects of the said Z fully and effectually indemnified from and against all actions claims and demands in respect of the non-payment of the said yearly rent or any part thereof or the breach non-performance or non-observance of the said covenants or any of them or in anywise relating thereto.

Covenant to discharge incumbrances.

3. THE Company hereby further covenants with the Trustee and the Executors and as a separate covenant with each of them that they will duly pay and discharge the said mortgages and all the moneys secured by the said mortgages and will at all times hereafter keep the Trustee and the Executors and his and their estate and effects and the estate and effects of the said Z deceased fully and effectually indemnified from and against all actions claims and demands in respect thereof or in anywise relating thereto.

4. THE Executors hereby acknowledge the right of the Company to production of the probate of the will of the said Z deceased and to delivery of copies thereof.

IN WITNESS *etc.*

THE FIRST SCHEDULE.

[*To contain particulars of the leasehold property.*]

THE SECOND SCHEDULE.

[*To contain particulars of the mortgages affecting the property.*]

Form 2.

Repairing Covenant by a Lessee with a New Form of Fair Wear and Tear Clause (*a*).

Drafted by Lionel A. Blundell, LL.M., Barrister-at-Law.

And [the lessee] will during the said term keep the said demised premises and all fixtures (except tenant's fixtures) and additions thereto in good substantial and tenantable repair and condition [damage by fire earthquake enemy action or tempest and] fair wear and tear to be excepted provided that the lessee shall take all reasonable measures and precautions to ensure that any damage defect or dilapidation which has been or at any time shall be occasioned by fair wear and tear shall not give rise to or cause or contribute to any substantial injury to the said demised premises

And will at the expiration or sooner determination of the said term peaceably surrender and yield up unto the lessor the said premises hereby demised with the appurtenances together with all buildings erections and fixtures now or hereafter to be built or erected thereon (except tenant's fixtures) in good substantial and tenantable repair and condition in all respects as aforesaid but subject to the exception[s] and proviso hereinbefore set out.

(*a*) This Form has been designed to meet the decision of the Court of Appeal in *Taylor* v. *Webb*, [1937] 2 K. B. 283. See the article on "The Fair Wear and Tear Clause", *ante*, p. 1. It has been the endeavour of the draftsman in settling this Form to set out explicitly in the covenant the reasonable limit to the exception of fair wear and tear which, it is thought, conveyancers in general believed previously to be implicit in the words of the clause. The covenants to repair specific defects after notice in writing, and to paint, paper, etc., will follow the usual form.

Form 3.

Legal Charge, Pursuant to the Provisions of the Settled Land Act, 1925, by the Personal Representatives of a Deceased Tenant for Life to Give Effect to an Equitable Charge by a Remainderman who has become Absolutely Entitled to the Settled Land (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

THIS LEGAL CHARGE is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Executors" which expression shall include the estate owner for the time being of the premises charged) of the first part C of *etc.* (hereinafter called "the Borrower") of the second part and E of *etc.* (hereinafter called "the Mortgagee" which expression shall include the persons deriving title under him) of the third part Parties.

WHEREAS under and by virtue of the deed of settlement (hereinafter called "the settlement") made the —— day of —— between X of the one part and the Executors (as trustees of such settlement) of the other part and in the events which have happened the freehold lands known as the X Settled Estates more particularly described in the First Schedule hereto were (immediately prior to the execution of the deed of mortgage Recitals.

(*a*) Stamp 6d. per £100 up to a maximum of 10s., as being an additional or substituted security: see Stamp Act, 1891, and Revenue Act, 1907, s. 7. The stamp should be adjudicated. A person who advances money on the security of a charge on the interest of any person entitled in remainder to settled land cannot obtain any legal charge nor can such a mortgagee protect his charge by registration under the Land Charges Act, 1925, as it is an equitable interest arising under a settlement and so not registrable under s. 10, Class C (iii). The mortgagee's protection rests on giving notice of his charge to the trustee of the settlement. When, however, the borrower's interest becomes an equitable fee simple vested in possession, before the legal estate is vested in him, or dealt with under his directions, the equitable mortgagee is entitled to request the estate owner in whom the settled land is vested to create a charge by way of legal mortgage for giving effect to the equitable charge: see the Settled Land Act, 1925, s. 16 (1) (iii).

hereinafter recited) settled upon trust for the said X for life with remainder to the Borrower absolutely free from incumbrances

AND WHEREAS by a vesting deed made the —— day of —— between the Executors of the one part and the said X of the other part the X Settled Estates were vested in the said X in fee simple free from incumbrance upon the trusts declared concerning the same by the settlement

AND WHEREAS by a deed of mortgage (hereinafter called "the equitable charge") made the —— day of —— between the Borrower of the one part and the Mortgagee of the other part the Borrower conveyed unto the Mortgagee all the X Settled Estates for an equitable estate in fee simple subject to the prior life interest of the said X to secure the principal sum of £x and interest

AND WHEREAS the said X died on the —— day of —— seised of the X Settled Estates no part of which had been sold since the execution of the said vesting deed and probate of his will was on the —— day of —— duly granted out of the Principal Probate Registry to the Executors

AND WHEREAS (*b*) the Executors have duly paid all death

(*b*) The above form of legal charge is intended to provide for the case where, owing to the death of the tenant for life, the legal estate in the settled land has become vested in his personal representative and the mortgagee of the remainderman's interest wishes to enforce his rights under s. 16 (1) (iii) before any legal estate is vested in the remainderman. The form can also be adapted for use where, as frequently happens, the equitable charge contains an express covenant by the borrower to execute a charge on his interest becoming vested in possession. In many cases, where the remainderman has become absolutely entitled, the mortgagee will be content to allow the legal estate in the settled land to be vested in the borrower and subsequently to take a legal mortgage direct from him, the mortgagee protecting himself, pending the execution of such a charge, by the registration of a land charge: Class C (iii). Where the remainderman has settled his reversionary interest this course is not very convenient and it is advisable, before the tenant for life's personal representatives give effect to such subsidiary settlement by assent, for the mortgagee to obtain a legal charge which will clearly have priority to such settlement. Where the land remains settled land under s. 1 (1) (v) of the Act by reason of its remaining subject to charges, a legal charge may nevertheless be created under the power conferred by the Law of Property (Amendment) Act, 1926, but such legal charge will be subject to the prior family charges.

duties and other administration expenses payable by reason of the death of the said X in respect of the X Settled Estates

And whereas the Executors have not given or made any previous assent or conveyance in respect of the legal estate in the X Settled Estates

And whereas there is now owing to the Mortgagee the said principal sum of £x but all interest thereon has been paid to the date of these presents

And whereas the Mortgagee has requested the Executors (*c*) and the Borrower to create a legal charge on the X Settled Estates for the purpose of securing the said sum of £x and interest secured by the equitable charge as aforesaid which the Executors and the Borrower have agreed to do in manner hereinafter appearing

Now this deed witnesseth as follows:—

Legal charge.

1. In pursuance of the said agreement and in consideration of the immediate payment of the said sum of £x not being required by the Mortgagee the Executors as personal representatives by the direction of the Borrower and the Borrower as beneficial owner hereby charge by way of legal mortgage All that freehold property known as the X Settled Estates situate in the parish of —— in the county of —— and more particularly described in the Schedule hereto with payment to the Mortgagee on the (*d*) —— day of —— next of the said sum of £x with interest thereon from the date hereof at the rate of £—— per cent. per annum and also so long as any principal money remains owing under this deed after the said —— day of —— with payment to the Mortgagee of interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of —— and the —— day of —— in each year And also with payment of all other moneys (if any) payable or to become payable under the equitable charge.

(*c*) Under the Settled Land Act, 1925, s. 16 (1) (iii) (b), on such request in writing the executors as estate owners of the settled land are bound to execute a legal mortgage.

(*d*) No date need be specified here, the date for payment in the equitable charge being relied upon, but it is convenient to insert such a date as it then is clear on the face of the legal charge when the statutory powers of sale, etc., will come into operation.

2. PROVIDED ALWAYS that the said sum of £x hereby secured and any interest thereon or any other money for the time being due on this security shall not constitute a debt due from or be recoverable against the Executors or either or any of them their or either of their executors or administrators personally.

3. IT IS HEREBY AGREED AND DECLARED that all the covenants for the payment of the said principal sum and interest on the part of the Borrower and all powers and provisions contained in the equitable charge (save in so far as the same have been modified by these presents) shall continue in full force and effect as if they were herein repeated and made applicable to the security hereby created.

4. THE BORROWER hereby covenants (*e*) with the Mortgagee AND IT IS HEREBY AGREED AND DECLARED as follows:—

(i) That the Borrower will during the continuance of this security keep all messuages buildings and property now or for the time being comprised in or subject to this security in good and substantial repair and insured against loss or damage by fire in not less than three-fourths of the value thereof in the —— Insurance Office or in some other insurance office or with underwriters of repute to be approved of in writing from time to time by the Mortgagee in the name or names of the Mortgagee or his assigns and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance immediately on the same becoming due or within one week thereafter and will on demand produce to the Mortgagee the policy or policies of such insurance and the receipt for every such payment AND that if default shall at any time be made by the Borrower in keeping the said premises or any part thereof in good and substantial repair or in effecting or keeping up such insurance as aforesaid or in producing any such policy or receipt to the Mortgagee on demand the Mortgagee may repair and keep the said premises or any part thereof in repair (with

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(*e*) Any additional covenants not contained in the equitable charge, which are required by reason of the fact that the borrower will now be in possession of the property, should be inserted here. In most cases a covenant to repair and insure will be required. There may be also other covenants required to meet the special character of the property.

power to enter upon the mortgaged premises for that purpose) or may insure and keep the same insured in any sum not exceeding £—— And that all moneys expended by the Mortgagee under this provision shall be deemed to be properly paid by him

(ii) That during the continuance of this security no person or persons shall be registered under the Land Registration Act 1925 or any Act amending or re-enacting the same as proprietor or proprietors of the property hereby mortgaged or any part thereof without the consent in writing of the mortgagee And that the costs incurred by the Mortgagee of lodging from time to time a caution against registration of the said property shall be deemed to be costs properly incurred by him under this deed.

4. The Executors hereby acknowledge the right of the Mortgagee to production of the probate of the will of the said X (the possession of which is retained by them) and to delivery of copies thereof.

In witness *etc.*

The Schedule.

[*To contain* (*f*) *a description of the property.*]

(*f*) If a full description of the property is inserted here it will not be necessary for any person dealing with the mortgagee to refer to the equitable charge.

Form 4.

Assent by the Personal Representatives of a Deceased Tenant for Life to a Remainderman Absolutely Entitled Subject to a Charge Created by the Personal Representatives (*a*).

Parties. THIS ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Executors") of the one part and C of *etc.* of the other part

Recitals. WHEREAS under and by virtue of a vesting deed made the —— day of —— between the Executors of the one part and X of the other part the X Settled Estates more particularly described in the Schedule hereto were vested in the said X in fee simple free from incumbrances upon the trusts of the settlement therein referred to

AND WHEREAS the said X died on the —— day of —— and his will dated the —— day of —— was on the —— day of —— duly proved in the —— Probate Registry of the High Court of Justice by the Executors

AND WHEREAS by a legal charge made the —— day of —— between the Executors of the first part the said C of the second part and E of the third part the X Settled Estates were charged by way of legal mortgage in favour of the said E to secure the principal money and interest as therein provided

Assent. Now the Executors as personal representatives of X hereby assent to the vesting in the said C of ALL AND SINGULAR the lands and hereditaments known as the X Settled Estates situate in the parish of —— in the county of —— as the same are more particularly described in the Schedule hereto for an estate in

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(*a*) If under hand only no stamp required: Administration of Estates Act, 1925, s. 36 (11). If under seal stamp 10s. This assent is intended for use with the previous form where, effect having been given to the equitable charges created by a remainderman by the creation of a legal charge, the executors of a deceased tenant for life propose to vest what previously was settled land in the remainderman absolutely subject to such charge.

fee simple subject to the hereinbefore-recited legal charge and to the principal money thereby secured and to all interest henceforth to become payable in respect thereof And the Executors hereby acknowledge the right of C to production of the probate of the will of X (the possession of which is retained by them) and to delivery of copies thereof.

In witness *etc.*

The Schedule.

[*To contain particulars of the property.*]

Form 5.

Lease of Gravel, Quartzite, and Sand.

Published by arrangement with Messrs. Hodgkinson & Beevor and R. Pilkington, LL.M.

Reference to the Lessors;

THIS LEASE made the —— day of —— 19— BETWEEN A B of *etc.* and C D of *etc.* (hereinafter called "the Lessors" which expression shall where the context so admits include the persons for the time being entitled to the reversion of the premises hereby demised expectant on the term hereby granted) of the

the Lessee.

one part and E F of *etc.* (hereinafter called "the Lessee" which expression shall where the context so admits include his executors administrators and assigns) of the other part

WITNESSETH AND DECLARETH as follows:—

Demise of lands at ——.

1. IN consideration of the rent and royalties hereinafter reserved and the covenants and agreements by the Lessee hereinafter contained the Lessors hereby demise unto the Lessee ALL THOSE [*parcels*] all which said lands are delineated on the plan hereto annexed and thereon coloured pink and are hereinafter called "the described lands".

Liberties

2. THERE are included in the said demise and for the purposes thereof the liberties following:—

to get gravel and sand;

(1) To enter upon the described lands and to search for dig work and obtain by excavations and quarryings open to the daylight and not by underground workings gravel quartzite and sand and to carry away and dispose of the same (hereinafter called "the described gravel quartzite and sand") from the described lands or any part thereof for the Lessee's own benefit

to make tramways.

(2) To make and construct any tramways or other roads or ways on the described lands which may be necessary or convenient for the effectual working getting carrying away and disposing of the described gravel quartzite and sand

General liberty of working.

(3) Generally to do all things which shall be convenient or necessary for working getting making merchantable and

disposing of the described gravel quartzite and sand and for obtaining the benefit of the rights liberties and privileges hereby granted.

3. THERE are excepted out of this demise:— Exceptions:

(i) All coal common clay brick earth mines and minerals in and under the described lands (other than the described gravel quartzite and sand) with full power and liberty for the persons entitled thereto to work get raise carry away and dispose of the same without leaving or providing any vertical or lateral support minerals;

(ii) All timber and other trees on the described lands with full power of entry to the Lessors and persons authorised by them to cut fell and carry away the same respectively timber, etc.;

(iii) All game nests and eggs of game hares rabbits wild fowl and fish with right of entry to the Lessors their friends licensees and servants for preserving shooting hunting fishing and sporting and also of trapping rabbits and vermin and sporting;

(iv) Full right and liberty for the Lessors and their tenants and persons authorised by any of them of passing and repassing at their own risk by all reasonable means and at all reasonable times through across or along the ways and roads now made or hereafter to be made upon the described lands. rights of road.

4. TO HOLD all the premises hereby demised (except and subject as aforesaid) UNTO the Lessee for the term of —— years from the —— day of —— 19— determinable as hereinafter mentioned and the period for which this lease shall be in operation is hereinafter called "the term". Term —— years from ——.

5. YIELDING AND PAYING yearly a minimum rent of £—— such rent to be paid by equal half-yearly payments on the —— day of —— and the —— day of —— in each year the first of such half-yearly payments to be made on the —— day of —— 19—. Minimum rent £—— per annum.

6. THE Lessee may work get and sell in every year such a quantity of the described gravel quartzite and sand as at the rate hereinafter mentioned would produce for that year royalties Recoupment of minimum rent.

equal in amount to the minimum rent but the said certain minimum rent of £—— shall always be paid whether such quantity shall in fact be gotten or sold or not.

Royalty.

7. And also yielding and paying on every —— day of —— and the —— day of —— the rent or royalty of —— pence for every cubic yard of the described gravel quartzite and sand and so in proportion for any less quantity which shall be raised or gotten and removed off the demised premises in any half-year of the term over and above the quantity which the Lessee is hereinbefore authorised to work get and remove in respect of the said certain minimum rent Provided always that if in any half-year the Lessee shall not raise get and remove off the demised premises such a quantity of the described gravel quartzite and sand as the above-mentioned rates would produce for that half-year the amount of the certain minimum rent hereby reserved then and in every such case the Lessee may in any subsequent half-years raise get and remove such a quantity of the described gravel quartzite and/or sand as shall be required to make up the deficiency without paying any rent for the same other than the said certain minimum rent but the surplus of any preceding half-year shall not come into aid or be applied to make up the deficiency of short sales in any subsequent half-years

Cesser of minimum rent.

Provided also that the minimum rent and royalties hereinbefore reserved shall cease to be payable when the whole of the described gravel quartzite and sand for the time being comprised in this lease shall have been paid for by the Lessee or it shall be found that any sand quartzite or gravel remaining shall not be commercially workable.

Covenants by the lessee as to :—

8. The Lessee for himself and his assigns and to the intent that the obligations may continue throughout the term hereby covenants with the Lessors as follows that the Lessee :—

Rent and royalties;

(1) Will pay the reserved rent and royalties at the time and in manner aforesaid

rates and taxes;

(2) Will bear pay and discharge all existing and future rates taxes assessments impositions and outgoings of any description imposed or charged upon the described lands or the produce thereof or any buildings machinery or

works for the time being on the described lands or the produce thereof or in respect of the rent and royalties hereby reserved or upon the owner or occupier in respect thereof or payable by either in respect thereof (except landlord's property tax land tax or any other tax which is or may be by statute made payable by a Lessor to the exclusion of the Lessee)

working; (3) Will do as little damage as possible to the surface of the described lands in the exercise of the rights hereby granted and will not work the described gravel quartzite and sand except in a proper and efficient manner and with reasonable expedition and according to the best and most approved method practised in similar undertakings in the neighbourhood and so as not to cause any avoidable nuisance and will not erect any industrial chimneys and will at the end or sooner determination of the term leave such parts of the described lands as shall have been worked as reasonably level as possible

fences; (4) Will make and keep in repair sufficient fences for the protection of man and beast around every quarry pit or other open place made in the described lands for the purpose of working the described gravel quartzite and sand and will also sufficiently fence off all tramways and other roads and ways from the adjoining lands and will make gates in such fences where reasonably required by the Lessors and in the case of the south and east boundary fences will keep the same intact and will leave sufficient support on the working side to keep such fences in good order and condition and will guard all boundary fences with red discs

not to employ undesirable persons; (5) Will not employ any person who to the Lessee's knowledge is not of a good character and will instantly dismiss any of his employees who may have been found poaching or setting traps or snares on the described or neighbouring lands and will not permit trespass on the described lands nor by such employees on any neighbouring lands of the Lessors.

quantity removed;

(6) Will cause the quantity of all the described gravel quartzite and sand removed by virtue of this lease to be duly ascertained in a manner approved by the Lessors or their agent for the time being and will not remove or suffer to be removed any gravel quartzite or sand from the described lands without the quantity thereof being so ascertained

inspection;

(7) Will permit the Lessors and their agent with or without other persons at all reasonable times to enter upon inspect and examine the described lands for the purpose of ascertaining or checking the quantity of gravel quartzite and sand from time to time removed and whether the same is being worked and carried on in a proper manner in accordance with the terms of this deed

accounts;

(8) Will keep proper books of account showing the exact quantities of gravel quartzite and sand gotten from the described lands and removed and at all reasonable times permit the Lessors and their agent and persons authorised by them to inspect such books

assignment;

(9) Will not assign or underlet or part with the possession of the demised premises or any part thereof without the consent in writing of the Lessors or their agent but such consent shall not be unreasonably withheld

delivery up at end of term.

(10) And will at the expiration or other sooner determination of the term deliver up to the Lessors all the premises then comprised in this lease in such state and condition as shall be consistent with the due exercise of the liberties and performance of the covenants hereinbefore contained.

Covenant by the Lessors for quiet enjoyment.

9. The Lessors hereby covenant with the Lessee that the Lessee paying the rent and royalties hereby reserved and observing and performing the several covenants and stipulations herein on his part contained shall and may peaceably hold and enjoy the premises liberties and powers hereby demised and granted during the term without any interruption by the Lessors or any person rightfully claiming under or in trust for them.

10. AND IT IS HEREBY AGREED as follows:—

(1) If the rent and royalties hereby reserved or any part thereof respectively shall be in arrear for thirty days (whether legally demanded or not) or if the Lessee shall commit any breach of the covenants and conditions hereinbefore contained and on his part to be observed and performed or if the Lessee shall become bankrupt or enter into any arrangement with his creditors then and in any such case it shall be lawful for the Lessors at any time thereafter into and upon the demised premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the Lessors in respect of any breach of the Lessee's covenants herein contained

Power of re-entry.

(2) Without prejudice to his liability to pay and satisfy all rents and sums of money payable by him under this deed the Lessee may at the expiration or sooner determination of the term or within three months thereafter unless the same shall be determined under the power of re-entry hereinbefore contained and in that case at any time not less than one month nor more than three months after such determination remove for his own benefit all his fixed and moveable engines machinery and other plant (and wooden buildings erected by the Lessee) which shall be in or upon any of the described lands

Power to Lessee at end of term to remove machinery.

(3) If any dispute or difference shall arise between the parties hereto respecting the construction of this lease or respecting any matter or thing arising out of or connected with this present demise then and in every such case the matter in difference shall be referred to a single arbitrator to be nominated in default of agreement by the President for the time being of the Law Society

Arbitration.

(4) The summary in the margin of this lease shall not affect its interpretation.

Marginal summary.

AS WITNESS the hands and seals of the Lessors and the Lessee.

Form 6.

Lease for a Term of Years Determinable on the Death of the Lessee (*a*).

Drafted by R. Pilkington, LL.M.

Reference to the Lessor;

THIS LEASE made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Lessor" which expression shall where the context so admits include the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted) of the one part and C D of *etc.* the wife of the Lessor (hereinafter called "the Lessee. Lessee" which expression shall where the context so admits include her executors and administrators) of the other part

WITNESSETH that in consideration of the rent covenants and conditions hereinafter reserved and contained and on the part Demise of lands at ——. of the Lessee to be paid observed and performed the Lessor doth HEREBY DEMISE Unto the Lessee the freehold property described

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(*a*) This precedent may usefully be adopted in cases where it is desired that one person shall have the right during his or her life or any less period of personal occupation of another's house, but in such a way as not to constitute the occupant a tenant for life under the Settled Land Act, 1925.

It was decided by Mr. Justice Bennett in *Re Catling, Public Trustee* v. *Catling*, [1931] 2 Ch. 359, that a person who is a tenant of settled land under a lease at a rent is, as a matter of necessary implication from the language of s. 20 (1) (iv) of the Settled Land Act, 1925, excluded from the class of persons upon whom the section confers the powers of a tenant for life, so that the lessee in the precedent has no power to sell the property.

As a result of s. 149 of the Law of Property Act, 1925, it is no longer possible to create a lease for life or lives and any attempt to create such a lease operates as a lease for a term of ninety years determinable after the death or marriage (as the case may be) of the lessee by at least one month's notice in writing. It would seem, therefore, that any lease (even a lease for a term of say three years) which is expressed to be determinable on the death or marriage of the lessee would take effect as a lease for a term of ninety years determinable as aforesaid, so that it is useless to create such a lease for any other term than ninety years.

The precedent contains an absolute prohibition against assignment, underletting or parting with the possession of the property, and a clause is also inserted enabling the lessor to determine the lease in the event of the lessee failing to reside personally on the premises for an aggregate period of nine months in any year.

in the Schedule hereto To HOLD the same unto the Lessee from the —— day of —— 19— for the the term of ninety years determinable as hereinafter mentioned PAYING THEREFOR yearly during the said term hereby granted the rent of £1 to be paid without any deduction except for landlord's property tax on the —— day of —— in every year the first of such payments to be made on the —— day of —— next. Term ninety years from ——. Reservation of nominal rent.

AND THE LESSEE HEREBY COVENANTS with the Lessor in manner following that is to say:— Covenants by the Lessee as to :—

1. THAT the Lessee will during the continuance of the term hereby granted pay the said yearly rent hereinbefore reserved and made payable at the times and in the manner at and in which the same is hereinbefore reserved and made payable without any deduction (except as aforesaid). Rent;

2. AND ALSO will from time to time and at all times during the said term pay and discharge all rates taxes duties charges assessments and outgoings whatsoever (whether Parliamentary parochial local or of any other description) which are now or may at any time hereafter be assessed charged or imposed upon or payable in respect of the said demised premises or the owner or occupier thereof the landlord's property tax only excepted. rates and taxes;

3. AND ALSO will once in every three years of the said term paint the outside wood and iron and stucco or cement work of the said premises and all additions thereto with two coats of good oil and white lead paint in a proper and workmanlike manner. outside painting;

4. AND ALSO will once in every seven years of the said term paint all the inside wood and iron work usually painted of the said demised premises and all additions thereto with three coats of good oil and white lead paint in a proper and workmanlike manner. inside painting;

5. AND will from time to time and at all times during the said term well and substantially repair cleanse maintain amend and keep the said messuage and buildings and all new buildings which may at any time during the said term be erected on and all additions made to the said demised premises and the fixtures therein and the walls fences roads sewers drains and appurten- repair;

ances thereof with all necessary reparations cleansings and amendments whatsoever.

maintaining gardens, etc.;

6. And also will at all times during the said term maintain the gardens and pleasure grounds of the said premises in good order and properly planted and carefully preserve the timber trees and all ornamental and fruit trees bushes and shrubs which are now or may at any time during the said term be growing on the said premises and replace such of the shrubs and plants as may die or require replacing.

works required by local authority;

7. And also will execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already or hereafter to be passed be directed or required by any district council local or public authority to be executed at any time during the said term upon or in respect of the said demised premises whether by the landlord or tenant thereof.

repair of party walls, etc.;

8. And also will at all times during the said term bear and pay all costs and expenses payable either by landlord or tenant in respect of the premises hereby demised of making repairing maintaining rebuilding and cleansing all ways roads pavements sewers drains pipes watercourses party walls party structures fences or other conveniences which shall belong to or be used for the said premises hereby demised or any additional buildings which may be erected as aforesaid in common with other premises near or adjoining thereto, and will keep the Lessor indemnified against all such costs and expenses as aforesaid.

delivery up at end of term;

9. And will at the expiration or sooner determination of the said term quietly yield up the said premises with the fixtures which are now or at any time during the said term shall be thereon in a good and tenantable state of repair and condition.

inspection;

10. And also will permit the Lessor or his agents at any time to enter the said premises and examine the state of repair and condition thereof And will repair and make good all defects of which notice in writing shall be given by the Lessor to the Lessee within three calendar months after the giving of such notice.

permitting Lessor to enter and repair;

11. And also that if the Lessee shall at any time make default in the performance of any of the covenants hereinbefore

contained for or relating to the repair of the said premises it shall be lawful for the Lessor (but without prejudice to the right of re-entry under the clause hereinafter contained) to enter upon the said premises and repair the same at the expense of the Lessee in accordance with the covenants and provisions of these presents and the expenses of such repairs shall be repaid by the Lessee to the Lessor on demand.

insurance;

12. And will during the said term keep the said messuage buildings and premises hereby demised insured against fire in some responsible office to the full value thereof in the joint names of the Lessor and the Lessee and whenever required produce to the Lessor the policy and receipt for the last premium in respect of such insurance and that in case of the destruction or damage of the said premises by fire the moneys received in respect of such insurance shall be laid out in rebuilding or reinstating the same.

alterations or additions to premises;

13. And also before making any alterations in the said messuage or the outbuildings thereof or erecting any other buildings on the said demised premises or any part thereof will obtain the approval in writing of the Lessor to the plans and specifications of such intended alterations or buildings and make or erect the same in such a manner as shall be so approved and not in any other manner.

injury to main walls and timbers;

14. And also will not at any time cut maim or remove the main walls or timbers of the said premises unless for the purpose of supplying and making good any defect therein which shall be supplied and made good accordingly.

nuisance;

15. And also that no act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the occupiers of any of the adjoining or neighbouring houses or the neighbourhood shall be done upon the said premises or any part thereof.

use of premises as private dwelling-house only;

16. And also will use and occupy the said messuage as a private dwelling-house only and for no other purpose.

prohibition against assignment, etc.

17. And also will not assign transfer underlet or part with the possession of the said demised premises or any part thereof.

And the Lessor hereby covenants with the Lessee that

Covenant by the Lessor for quiet enjoyment.

the Lessee paying the rent hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on her part to be performed and observed shall and may peaceably and quietly hold and enjoy the said premises hereby demised during the said term hereby granted without any lawful interruption or disturbance from or by the Lessor or any person or persons claiming under or in trust for him.

Power to determine on death of Lessee.

PROVIDED ALWAYS AND IT IS HEREBY AGREED that the term hereby granted shall be determinable after the death of the Lessee by the Lessor giving to the personal representatives of the Lessee or the personal representatives of the Lessee giving to the Lessor six calendar months' previous notice in writing (*b*)

Power to determine on Lessee's failure personally to reside.

PROVIDED ALSO that if in any year of the said term the Lessee (unless prevented from so doing by forces outside her control) shall not personally reside in or upon the said demised premises for an aggregate period of nine months then and in any such case the Lessor shall be entitled to determine the term hereby granted upon giving to the Lessee one month's previous notice in writing of his intention so to do and thereupon this present lease and everything herein contained shall cease and be void without prejudice to any claim by either party against the other in respect of any antecedent breach of any covenant or condition herein contained

Power of re-entry.

AND PROVIDED ALSO that if the rent hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall become due (whether legally demanded or not) or in the event of any breach of any of the covenants and agreements on the part of the Lessee herein contained or of her becoming bankrupt or having a receiving order made against her or entering into any composition or arrangement for the benefit of her creditors the Lessor may re-enter upon the said demised premises.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

(*b*) This clause can easily be adapted to meet a less period than life, *e.g.*, marriage or remarriage, in which case of course notice would be given to or by the lessee and not the personal representatives.

Form 7.

Conveyance in Fee Simple in Exercise of the Statutory Trusts for Sale, where the Property was Originally Conveyed to the Vendors as Joint Tenants or as Tenants in Common since 1925 (*a*).

THIS DEED OF CONVEYANCE made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Vendors") of the one part and C of *etc.* (hereinafter called "the Purchaser") of the other part Parties.

WHEREAS: Recitals.

(1) By a conveyance made the —— day of —— 1928 between X of the one part and the Vendors of the other part the property hereby assured was conveyed to the Vendors in fee simple as joint tenants [*or*, as tenants in common]

(2) The said conveyance operated to vest the said property in the Vendors as joint tenants upon the statutory trusts for sale in manner provided by the Law of Property Act 1925 free from incumbrances

(3) The Vendors in exercise of the said trust for sale have agreed with the Purchaser for the sale and transfer to him for the sum of £—— of the fee simple of the property hereby assured free from incumbrances

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £—— now paid by the Purchaser to the Vendors (the receipt whereof the Vendors hereby acknowledge) the Vendors as beneficial owners (*b*) [*or*, as trustees] and in execution of the said statu- Witnesseth.

(*a*) Stamp, *ad valorem* on the purchase-money.

(*b*) When the vendors are in fact beneficial owners they can properly convey as such and the purchaser will obtain the benefit of the wider covenants. If, though holding the legal estate, they are in fact not beneficially entitled to the entirety of the property they should convey as trustees.

tory trust for sale thereby convey unto the Purchaser ALL THAT piece or parcel of land known as —— situate at —— in the county of —— TO HOLD unto the Purchaser in fee simple (*c*) [*acknowledgment as to the right to the production of documents and statement as to value, if required*].

IN WITNESS *etc.*

(*c*) When the vendors are beneficially entitled to the entirety and convey as beneficial owners, a provision may be inserted here limiting their respective liability by way of damages in respect of any breach of the covenant implied by their conveying as beneficial owners to such proportion of the damages as represents their respective shares in the proceeds of sale. Such a provision, though frequently inserted, appears to be inconsistent with the legal joint tenancy and, if the vendors insist upon it, generally it is advisable to accept a conveyance from the vendors as trustees and so avoid all need for the clause.

Form 8.

Appointment by a Surviving Joint Tenant of a New Trustee of the Statutory Trusts Affecting Land Conveyed since 1925 to the Appointor and to the Deceased Trustee as Joint Tenants (*a*).

THIS DEED OF APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Appointor") of the first part B of *etc.* of the second part and the said A and B of the third part Parties.

WHEREAS: Recitals.

(1) By a deed of conveyance (hereinafter called "the conveyance") made the —— day of —— 1926 between X of the one part and the Appointor and Y of the other part the house and land known as —— situate at —— in the county of —— were expressed to be conveyed to the Appointor and the said Y in fee simple as joint tenants and the premises thereupon vested in the Appointor and the said Y as joint tenants upon the statutory trusts for sale in manner provided by the Law of Property Act 1925

(2) The said Y died on the —— day of ——

(3) The Appointor is desirous of appointing the said B to be a trustee of the said house and land and of the statutory trusts affecting the same in place of the said Y

NOW THIS DEED WITNESSETH that in exercise of the power for this purpose by the statute in that behalf given to the Appointor and of every or any other power enabling him the Witnesseth.

(*a*) Stamp, 10s. If an express vesting declaration is inserted an additional 10s. stamp is required. Where since 1925 land is expressed to be conveyed to joint tenants beneficially, it vests in them under s. 36 of the Law of Property Act, 1925, upon the statutory trusts for sale contained in the Act. On the death of one joint tenant the survivor may, if solely and beneficially interested, deal with the legal estate as if it were not held on trust for sale: see the last paragraph added to s. 36 (2) by the L. P. (Amnd.) Act, 1926. In most cases a conveyance by a surviving joint tenant as beneficial owner will be the best course. In others, and where there has been a severance of the joint tenancy in equity, the surviving joint tenant will wish to continue to deal with the property under the statutory trusts, and the above form is intended to provide for the appointment of an additional trustee of such trusts.

Appointor hereby appoints the said B to be a trustee in place of the said Y of the said house and land known as —— and of all other (if any) the lands so vested in the Appointor by the conveyance as aforesaid and to act jointly with the Appointor for all the purposes of the statutory trusts (*b*).

IN WITNESS *etc.*

Form 9.

Appointment by a Surviving Tenant in Common of a New Trustee of the Statutory Trusts Affecting Land Conveyed since 1925 to Him and a Co-tenant (*a*).

Parties. THIS DEED OF APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Appointor") of the first part B of *etc.* of the second part and the said A and B of the third part

Recitals. WHEREAS:

(1) By a deed of conveyance (hereinafter called "the conveyance") made the —— day of —— between X of the one part and the Appointor and Y of the other part the hereditaments [therein more particularly described and] known as —— situate at —— were expressed to be conveyed to the Appointor and the said Y in fee simple as tenants in common

(2) By virtue of the provisions of the Law of Property Act 1925 the said hereditaments vested in the Appointor and the said Y upon the statutory trusts in manner provided by the said Act

(3) The said Y died on the —— day of ——

(*b*) No vesting declaration is necessary: Trustee Act, 1925, s. 40.

(*a*) Stamp, 10s. If a vesting declaration is added, an additional 10s. stamp is required. This appointment is to meet the case where, since 1925, land has been conveyed to tenants in common as such, and no express trust for sale was inserted in the conveyance when, under s. 34 of the Law of Property Act, 1925, the legal estate becomes subject to the statutory trusts for sale. In this case, on the death of one tenant in common the survivor should appoint a new trustee of the statutory trusts. It is generally convenient to make such an appointment even if the beneficial interest in the deceased tenant in common's share has become vested in the survivor, as such appointment will enable the property to be dealt with under the statutory trusts without any reference to the beneficial title.

(4) The Appointor is desirous of appointing the said B to be a trustee of the said hereditaments and of the statutory trusts affecting the same in place of the said Y

NOW THIS DEED WITNESSETH that in exercise of the power for this purpose by the statute in that behalf given to the Appointor and of every or any other power enabling him the Appointor hereby appoints the said B to be a trustee in place of the said Y of the said hereditaments known as —— and of all other (if any) the lands and hereditaments so vested in the Appointor by the conveyance as aforesaid and to act jointly with the Appointor for all the purposes of the statutory trusts (*b*). Witnesseth.

IN WITNESS *etc.*

Form 10.

Appointment by Administrators (who have Completed the Administration of the Estate) of New Trustees of the Trust for Sale Arising Under Section 33 of the Administration of Estates Act, 1925, in respect of the Intestate's Residuary Estate (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

THIS DEED OF APPOINTMENT is made the —— day of —— Parties.

(*b*) No vesting declaration is necessary.

(*a*) Stamp 10s. When administrators have paid all the intestate's debts and funeral and testamentary expenses and have fully administered his estate, they cease to hold the intestate's residuary estate in their capacity as personal representatives, but they hold it as trustees for sale under s. 33 of the Administration of Estates Act, 1925. If, by reason of the subsistence of a life interest or the minority of any beneficiary, it is not possible immediately to transfer the residuary estate to the beneficiaries entitled to it, the administrators should mark the termination of the administration by executing assents in writing vesting the unsold realty in themselves as new trustees upon trust for sale: *Re Yerburgh*, [1928] W. N. 208. It is advisable to execute such assents, as they terminate the administration and so operate to end the liability of the sureties to the administration bond. If the administrators intend to continue to administer the trusts that affect the residuary estate all that is required is for them to vest the land in themselves as trustees for sale, but they may also, if they wish, execute a deed poll stating that they hold the other assets of the deceased, including his investments thenceforth, as trustees for sale. If, on the other hand, the administrators do not wish to continue to act, they should in the above form appoint new trustees of the statutory trust for sale.

19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Appointors") of the first part the said B of the second part and C of *etc.* (hereinafter called "the New Trustee") of the third part

Recitals. WHEREAS X (hereinafter called "the Intestate") died on the —— day of —— intestate and letters of administration to his estate were on the —— day of —— granted out of the —— Probate Registry to the Appointors

AND WHEREAS the Intestate left him surviving his widow the said A and two children and no more namely Y and Z who are both under the age of twenty-one years having been born on the —— day of —— and the —— day of —— respectively

AND WHEREAS the Intestate's funeral and testamentary expenses and debts and the death duties payable on his death have been duly paid and satisfied

AND WHEREAS (*b*) the Intestate's personal chattels and the net sum of £1000 together with interest thereon at the rate of £5 per cent. per annum from the date of the Intestate's death to the date of payment have respectively been duly transferred and paid to the said A as she hereby admits

AND WHEREAS the Intestate's residuary estate now held by the Appointors subject to the statutory trusts for sale and investment applicable thereby by virtue of section 33 of the Administration of Estates Act 1925 consists of the investments and cash specified in the First Schedule hereto and of the freehold and leasehold properties specified in the Second Schedule hereto

AND WHEREAS the said B is desirous of being discharged from the trusts of the Intestate's residuary estate and the said A and B are desirous of appointing the New Trustee to be a trustee of the said residuary estate in place of the said B

AND WHEREAS the said investments specified in the First Schedule hereto are intended to be forthwith transferred by the

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(*b*) This appointment will not be one of the documents dealing with the legal estate. It should contain recitals recording the manner in which the administrators have dealt with the assets and if any beneficiary, other than the widow, has been paid a share, this should be recited.

said Appointors into the joint names of the said A and the New Trustee and it is intended to execute assents in writing vesting the freehold and leasehold land specified in the Second Schedule hereto in the said A and the New Trustee

NOW THIS DEED WITNESSETH as follows:—

1. IN exercise of the power for this purpose by the statute in that behalf given to the Appointors and of every or any other power enabling them in this behalf the Appointors hereby appoint the New Trustee to be a trustee in the place of the said B and to act jointly with the said A for all the purposes of the trusts affecting the residuary estate of the Intestate under or by virtue of the provisions of the Administration of Estates Act 1925 or otherwise or such of the same purposes as are still subsisting and capable of taking effect. Appointment.

2. SECTION 40 of the Trustee Act 1925 shall not apply to this deed (*c*).

IN WITNESS *etc.*

THE FIRST SCHEDULE.

[*To contain a list of the investments and cash to be transferred to the trustees.*]

THE SECOND SCHEDULE.

(*To contain short particulars of the intestate's land.*]

(*c*) It is well to negative the operation of s. 40 of the Trustee Act, 1925, so that the land may be vested in the trustees by simple assents in writing. In this way the appointment will not be brought on to the legal title at all. For a form of assent see the next precedent.

Form 11.

Assent by Administrators (who have Completed the Administration) Vesting the Intestate's Lands in Trustees for Sale under Section 33 of the Administration of Estates Act, 1925 (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

WE A of *etc.* and B of *etc.* as the personal representatives of X who died on the —— day of —— and letters of administration to whose estate were granted to us on the —— day of —— out of the —— Probate Registry DO HEREBY as personal representatives ASSENT to the vesting in the said A and C of *etc.* (*b*) FIRST of ALL AND SINGULAR the freehold properties described in the First Schedule hereto and SECONDLY of ALL AND SINGULAR the leasehold properties specified in the Second Schedule hereto for all the estate or interest of the said X at the time of his death UPON TRUST to sell the same or any part thereof with full power to postpone such sale AND to stand possessed of the net proceeds of sale upon the trusts applicable thereto under the provisions of the Administration of Estates Act 1925 by reason of the death intestate of the said X AND we hereby acknowledge the right of the said A and C to production of the said grant of administration to the estate of the said X (possession of which is retained by us) and to delivery of copies thereof.

AS WITNESS *etc.*

THE FIRST SCHEDULE.

[*To contain particulars of the intestate's freeholds.*]

THE SECOND SCHEDULE.

[*To contain particulars of the intestate's leaseholds.*]

(*a*) This assent is intended to be used where there is not an immediate distribution of an intestate's lands but his estate has to be retained, after the estate has been administered, upon the statutory trust for sale under s. 33 of the Administration of Estates Act, 1925: see *Re Yerburgh*, [1928] W. N. 208. This form can be used both where the administrators have appointed new trustees to hold the intestate's residuary estate (see the immediately preceding form) and where they are proposing to continue to act as trustees of the estate and hold the land themselves as trustees for sale.

(*b*) This assent deals with the intestate's freehold and leasehold properties. In most cases it will be advisable to execute separate assents in respect of the freeholds and leaseholds so as to avoid a common document of title.

Form 12.

Assent by the Executor of a Tenant in Common in favour of the Surviving Tenant in Common (Equitable Interest) (*a*).

Drafted by Alfred Wilson, Solicitor.

Parties.

THIS ASSENT is made the —— day of —— 19— BETWEEN A *of etc.* (hereinafter called "the Executor") of the one part and B of *etc.* (hereinafter called "the Beneficiary") of the other part

Recitals: title of testatrix;

WHEREAS by deed dated the —— day of —— 19— and made between C of the one part and D and the Beneficiary of the other part the property hereinafter described was conveyed unto the said D and the Beneficiary upon trust to sell the same by public auction or private contract and divide the net proceeds between themselves in equal shares

will and death of the testatrix;

AND WHEREAS the said D (hereinafter called "the Testatrix") died on the —— day of —— 19— having by her will dated the —— day of —— 19— devised her real estate and bequeathed her personal estate to the Beneficiary absolutely

probate;

AND WHEREAS probate of the said will was granted to the Executor out of the —— Probate Registry on the —— day of —— 19—

payment of debts.

AND WHEREAS the testatrix's debts funeral and testamentary expenses have been paid and the Beneficiary has requested the Executor to make this assent in manner hereinafter appearing

Assent.

NOW in pursuance of the said request the Executor as personal representative of the testatrix hereby assents to the vesting of the share estate and interest of the testatrix of and in the house and premises known as No. — —— Street situate at —— or in the proceeds of the sale thereof in the Beneficiary To the intent that the entirety of the said property shall henceforth vest in the Beneficiary in fee simple freed and discharged from the trust for sale expressed in the before-recited conveyance AND the Executor hereby acknowledges the right of the Beneficiary to the production and delivery of copies of the probate of the will of the testatrix.

AS WITNESS *etc.*

(*a*) No stamp required.

Form 13.

Will of a Married Man providing for his Wife and Children (Short Form) (*a*).

Revocation of previous wills.

I, A of *etc.* HEREBY REVOKE all wills and codicils heretofore made by me and DECLARE this to be my last will.

Gift to wife.

IN CASE my wife B survive me I appoint my wife to be sole executrix of this my will and I devise and bequeath all (*b*) my property both real and personal unto my said wife B absolutely.

IN CASE my wife predecease me then I WILL AND DECLARE as follows:—

1. I APPOINT X of *etc.* and Y of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will [and I appoint them to be guardians of my infant children].

Legacy.

2. I BEQUEATH to each of the said X and Y if they shall respectively prove my will the sum of £—— free of duty.

Trust for sale and conversion.

3. I DEVISE and bequeath all (*c*) my property real and personal unto my Trustees upon trust to sell call in and convert into money such parts thereof as may not consist of money but

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(*a*) This will is intended to provide for the case of a married man of small means who wishes to leave all his property to his wife should she survive him, and if she does not, to his children, and does not desire to create elaborate trusts.

(*b*) This gift is reasonable in cases where the testator's estate is small and he expects his widow to expend capital on the maintenance of herself and her family. Where the testator contemplates his widow living on the income and ultimately leaving the capital to the issue of the marriage, it is better to give to her a life estate only with a special power of appointment in favour of children and remoter issue. If this is done no further estate duty will be payable in respect of the settled property on her death: see the Finance Act, 1894, s. 5 (2); Finance Act, 1914, s. 14 (a).

(*c*) This operates under s. 27 of the Wills Act, 1837, as an exercise of any general power of appointment vested in the testator, unless a contrary intention appears: *Re Jacob*, [1907] 1 Ch. 445. In the case of testators who are not known in fact to have any powers to exercise all reference to powers can be left out as this keeps the will somewhat simpler in form. This form of devise and bequest will not operate under the power conferred by s. 176 of the L. P. Act, 1925, to disentail property of which the testator was tenant in tail. Where such disentail is desired this must be done expressly.

so that my Trustees shall have power to postpone (*d*) such sale and conversion for such a period as they without being liable to account may think proper and so that reversionary interests shall not be sold until they fall into possession unless my Trustees see special reason for the sale.

Application of income of unconverted property.

4. THE INCOME of the unsold portions of the said real and personal estate shall from my death be applied in like manner as if the same were income of the investments hereinafter directed of the proceeds of sale thereof and no reversionary (*e*) or other property not actually producing income shall be treated as income bearing for the purposes of my will.

Trust to pay debts.

5. MY TRUSTEES shall out of the net money to arise from the sale and conversion of my real and personal property after payment of costs and out of any ready money pay my funeral and testamentary expenses debts and legacies.

Trust to invest.

6. MY TRUSTEES shall stand possessed of the residue of the said moneys upon trust to invest the same upon any investment for the time being authorised by law (*f*) for the investment of trust moneys with power to vary or transpose such investments for or into others of a like nature.

Trust for children.

7. MY TRUSTEES shall stand possessed of the residue of the said moneys and of the investments representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (hereinafter called "my residuary estate") in trust for all or any my children or child living at my death and the children or child then living of any then deceased child of mine who whether children or grandchildren attain the age of twenty-one years or marry (*g*) under that age

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(*d*) This is necessary as the power to postpone sale implied in the case of land by virtue of s. 25 (1) of the L. P. Act, 1925, does not extend to personalty.

(*e*) See *Re Hubbuck*, [1896] 1 Ch. 754; *Re Lewis*, [1907] 2 Ch. 296.

(*f*) In the case of small estates it is probably advisable to limit the power to trustee investments. The circumstances of the estate must be considered: see Form No. 18, Vol. I, p. 451, for an investment clause giving a wide range of investments.

(*g*) This trust follows the trusts contained in the Administration of Estates Act, 1925, s. 47 (1) (i) and makes no distinction between sons and daughters, the share of both vesting as well on marriage as on attaining twenty-one. Under the old system of making boys' shares vest

if more than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and attained a vested interest [*or*, (*h*) in trust for all or any of my children or child living at my death who attain the age of twenty-five years if more than one in equal shares as tenants in common PROVIDED ALWAYS that if any child of mine shall die in my lifetime (whether before or after the date of this my will) or shall fail to attain the age of twenty-five years leaving a child or children such child or children attaining the age of twenty-one years or marrying (*g*) under that age shall take by substitution if more than one as tenants in common in equal shares the share in my residuary estate which such deceased child of mine would have taken had he or she survived me and attained a vested interest].

Ultimate residuary gift.

8. IN THE EVENT of the trusts hereinbefore declared failing my Trustees shall stand possessed of my residuary estate upon trust for Z absolutely.

Powers of maintenance and advancement.

9. THE STATUTORY (*i*) powers of advancement and maintenance are applicable hereto and shall be exercisable by my Trustees [and (*j*) I FURTHER DECLARE that the said powers of advancement and maintenance shall continue to be exercisable by my Trustees for the benefit of any child of mine who shall

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at twenty-one, there is a risk of depriving the children of an earlier marriage of all share of the estate.

(*h*) This is an alternative trust to meet the somewhat numerous cases where it is desired to postpone vesting to twenty-five. Where this clause is inserted, it is advisable to consider whether power should be given to the beneficiaries to appoint the income of a portion of their shares to a surviving spouse.

(*i*) The statutory powers of advancement and maintenance would apply in this case, but it seems advisable expressly to refer to them so that the testator may be alive to their incorporation in his will.

(*j*) The words in brackets will only be required if the second alternative trust is adopted. Where vesting is postponed beyond twenty-one, the provisions of the Trustee Act, 1925, s. 31 (1) (ii) apply. If the testator wishes the trustees to have power to accumulate income, which they consider the beneficiary does not require, it is necessary for the testator to show expressly a contrary intention under s. 69 (2) negativing the provisions of s. 31 (1) (ii). If this is not done, the beneficiary will be entitled to all the income under the statutory provision: see *Re Spencer*, [1935] Ch. 533; *Re Turner*, [1937] 1 Ch. 15.

have attained the age of twenty-one years but who shall not have attained the age of twenty-five years and the income of the share of my residuary estate of any child of mine who has not attained a vested interest therein which shall not be required for maintenance shall during the period of twenty-one years from my death be accumulated in manner provided by section 31 (2) of the Trustee Act 1925].

Appointment of new trustees.

10. THE STATUTORY power of appointing a new trustee or new trustees hereof shall be applicable hereto and I DECLARE that the persons for the time being having power to appoint new trustees hereof may (with the consent in writing of all beneficiaries then interested in my residuary estate who have attained the age of twenty-one years) appoint the Public Trustee or a trust corporation to be a trustee of this my will and any trust corporation so appointed may charge (*k*) and be paid the fees from time to time ordinarily charged by such corporation.

Power of professional trustees to charge.

11. ANY TRUSTEE of this my will being a solicitor or other person engaged in any profession or business may be so employed or act in the trust hereof and shall be entitled to charge and be paid all usual or proper professional or other charges for any business or act done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person (*l*).

IN WITNESS *etc.*

(*k*) Unless an express power to charge is conferred an application will be necessary to the Court under s. 42 of the Trustee Act, 1925, to sanction the appointment in order to enable the trust corporation to debit the trust estate with its charges: *Forster* v. *Williams Deacon's Bank, Ltd.*, [1935] Ch. 83.

(*l*) *Re Chapple*, 27 Ch. D. 584.

Form 14.

Will of a Widow providing for Spinster Daughters (Short Form) (*a*).

I, A of *etc.* widow hereby revoke all wills and codicils heretofore made by me and DECLARE this to be my LAST WILL.

Appointment of executors.

1. I APPOINT X of *etc.* and Y of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

Legacies.

2. I GIVE to each of my daughters B, C and D the sum of £—— free of duty to be paid to them respectively immediately after my death for their immediate requirements and in priority to all other bequests.

3. I BEQUEATH to each of the said X and Y if they shall respectively prove my will the sum of £—— free of duty.

4. I GIVE to my said daughters free of duty all my clothes and jewellery in equal shares absolutely.

Settlement of furniture.

5. I BEQUEATH to my Trustees free of duty all the furniture chattels and effects which shall at my death be in or about or appropriated to my house known as —— (hereinafter called "my furniture") except such articles as from their trifling value or perishable nature my Trustees shall consider unsuitable to be settled which said excepted articles I give to my said three daughters absolutely free of duty. My Trustees shall hold my furniture upon the following trusts:—

(i) Upon trust to permit such of my said daughters as shall for the time being be unmarried to have the use and enjoyment thereof during their joint lives and the life of the survivor. In the event of my unmarried daughters not living together my Trustees shall divide my furniture equally between my said

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(*a*) This will is intended to meet the case of a parent who wishes to provide for spinster daughters, all the income being settled on the daughters who are for the time being unmarried. The form is only suitable for use where the estate is small and barely sufficient to provide for the maintenance of the daughters. It makes no adequate provision for married children and their issue.

daughters in such manner as may seem most expedient to my Trustees and each of my daughters may have the use and enjoyment of such part of my furniture as may be appropriated to her by my Trustees for such time as she remains unmarried. On her death or marriage the appropriated share of such daughter shall be held on trust for my other unmarried daughters or daughter. My daughters having the use of my furniture shall keep it insured against fire.

(ii) On the death or marriage of the survivor of my unmarried daughters my Trustees shall hold my furniture upon the trusts hereinafter declared concerning my residuary estate.

(iii) I HEREBY DECLARE that it shall be lawful for my Trustees at any time with the consent in writing of my unmarried daughters or daughter to sell my furniture or any part thereof and to invest the proceeds of sale in the purchase of other furniture or effects to be held on the like trusts or if no additional furniture is required the proceeds of sale shall fall into and form part of my residuary estate.

(iv) I further declare that it shall not be necessary for my Trustees to make an inventory of my furniture and that my Trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatever.

Residuary gift.

6. I DEVISE and bequeath all my property both real and personal unto my Trustees upon trust to sell call in and convert into money such parts thereof as may not consist of money but so that my Trustees shall have power to postpone such sale and conversion for such a period as they without being liable to account may think proper and so that reversionary interests shall not be sold unless my Trustees see special reason for the sale.

Provisions as to income.

7. THE INCOME of the unsold portions of the said real and personal estate shall from my death be applied in like manner as if the same were income of the investments hereinafter directed of the proceeds of sale thereof and no reversionary or other property not actually producing income shall be treated as income bearing for the purposes of my will.

Trust to pay debts.

8. My Trustees shall out of the net money to arise from the sale and conversion of my real and personal property after payment of costs and out of my ready money pay my funeral and testamentary expenses debts and legacies.

Trust to invest.

9. My Trustees shall stand possessed of the residue of the said moneys upon trust to invest the same upon any investment for the time being authorised by law for the investment of trust moneys with power to vary or transpose such investments for or into others of a like nature.

Provision as to dwelling-house.

10. I declare that my Trustees shall not sell my said freehold house and lands known as —— without the consent in writing of such of my said daughters as shall for the time being be unmarried and pending such sale I direct my Trustees to permit such of my said unmarried daughters or daughter as may desire to do so to occupy —— rent free.

Beneficial trusts.

11. My Trustees shall stand possessed of the residue of the said moneys and of the investments representing the same and of such parts of my residuary estate as shall for the time being remain unsold and unconverted (hereinafter called "my residuary estate") upon the following trusts:—

(i) My Trustees shall hold the income of my residuary estate on protective trusts for the benefit of such of my three daughters and the survivors or survivor of them as shall for the time being be unmarried.

(ii) In the event of any of my said daughters (*b*) marrying I direct my Trustees to stand possessed of an annuity of £—— upon protective trusts for the benefit of each of my daughters so marrying.

(iii) In the event of all my said daughters or the survivor of them marrying my Trustees shall stand possessed of the income of my residuary estate on protective trusts for the benefit of such married daughters or daughter.

(iv) On the death of the survivor of my said daughters my Trustees shall hold the capital and income of my residuary estate

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(*b*) If the estate is of sufficient size it is desirable to give to a daughter marrying an annuity for pin-money. But this should not be done if the estate is so small that it would jeopardise the position of the unmarried daughters.

in trust for all or any my grandchildren (*c*) who attain the age of twenty-one years or marry under that age if more than one in equal shares.

(v) In the event of the trusts hereinbefore declared failing my Trustees shall stand possessed of my residuary estate upon trust for Z absolutely.

12. THE STATUTORY POWERS of advancement and maintenance are applicable hereto and shall be exercisable by my Trustees.

13. THE STATUTORY POWER of appointing a new trustee or new trustees hereof shall be applicable hereto and I DECLARE that the persons for the time being having power to appoint new trustees hereof may (with the consent in writing of all beneficiaries interested in my residuary estate who have attained the age of twenty-one years) appoint the Public Trustee or a trust corporation to be a trustee of this my will and any trust corporation so appointed may charge and be paid the fees from time to time ordinarily charged by such corporation. Power to appoint new trustees.

14. ANY TRUSTEE of this my will being a solicitor or other person engaged in any profession or business may be so employed or act in the trusts hereof and shall be entitled to and be paid all usual or proper professional or other charges for any business or act done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person. Power to charge.

IN WITNESS *etc.*

(*c*) This trust follows the lines of the trusts in s. 47 (1) of the Administration of Estates Act, 1925, and makes no distinction between male and female grandchildren as each takes a vested interest on marriage.

Form 15.

Will of a Married Man providing for his Wife, Grown-up Children and Remoter Issue, with provisions intended to Save the Children Income and Surtax (Short Form) (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

I, A of *etc.*, hereby revoke all wills and codicils heretofore made by me and DECLARE this to be my LAST WILL.

Appointment of executors.

1. I APPOINT X of *etc.* and Y of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

2. [*Bequest of furniture and personal effects.*]

3. [*Pecuniary legacies.*]

Gift of residue.

4. I DEVISE and bequeath the residue of my real and personal property to my Trustees upon trust to sell call in and convert the same into money with power to postpone such sale calling in and conversion indefinitely without being responsible for loss and I DIRECT that the income of the unsold part thereof for the time being shall be applied in the same manner as if it were

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(*a*) This will is intended to provide for the case of a testator of substantial fortune who wishes to provide for a grown-up family. Its provisions proceed on the assumption that the testator regards the number of his own children as known and is proposing to make provision for remoter descendants. The provisions of the Finance Act, 1936, s. 21, have now made it advisable for grandparents, who are settling substantial fortunes on their children, out of which it is proposed that grandchildren shall be maintained, to consider the question of income tax and surtax. S. 21 only applies to property provided or settled by a parent. The income of such property is during the minority of the child aggregated with the parents' income for income tax and surtax purposes. If, therefore, all the testator's income goes direct to his children, they will have to pay income tax and surtax on the whole, notwithstanding that a portion of it is applied for the maintenance and education of the grandchildren. It will not be possible for the children, in view of the provisions of the section, to divest themselves of a portion of such income in favour of the grandchildren with a view to saving such tax. It is therefore advisable to provide a fund for the maintenance of grandchildren. The income of this fund will not form part of the income of the children; it will not therefore be aggregated with their income and some income tax and all the surtax otherwise payable in respect of income applied for maintenance will be saved. The advantages of such a scheme must depend on the circumstances of the family under consideration. In cases where the grandchildren have themselves already a considerable income, such an arrangement by grandparents offers no advantages.

income of investments of the proceeds of sale calling in and conversion thereof.

Payment of debts.

5. My Trustees shall out of the proceeds of such sale and calling in and out of my ready money pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto [and the duty on any legacies hereinbefore given free of duty].

Trust to invest.

6. My Trustees shall invest the residue of the said moneys in their names in or upon any investments for the time being authorised by law for the investment of trust funds.

Provisions as to dwelling-house.

7. I declare that no sale shall be made of my dwelling-house known as —— or of any other dwelling-house where I may be residing at my death during the lifetime of my wife without her consent in writing and until such sale I direct my Trustees to permit my wife to occupy such dwelling-house rent free so long as she may desire so to do.

Life interest for widow.

8. My Trustees shall pay the income of the said moneys (which with the investments for the time being representing the same are hereinafter called "the trust fund") to my wife during her life.

Trusts in favour of children.

9. After the death of my wife my Trustees shall stand possessed of the trust fund upon the trusts and with and subject to the powers and provisions hereinafter declared concerning the same.

10. As to one equal fourth part or share of the trust fund (hereinafter called "C's share") my Trustees shall hold the same in trust for my son C absolutely if he shall be living at the death of the survivor of myself and my wife And if my said son C shall die in my lifetime or in the lifetime of my wife (whether before or after the date of my will) leaving children C's share shall be held in trust for all or any the children or child of C who attain the age of twenty-one years or marry under it and if more than one in equal shares.

11. As to a further one equal fourth part or share of the trust fund (hereinafter called "D's share") my Trustees shall hold the same upon the like trusts in favour of my son D and his issue as are hereinbefore declared concerning the share settled

in favour of C and his issue as if such trusts were here set out at length with the substitution of the name of the said D for that of the said C.

12. As to a further equal fourth part or share of the trust fund (hereinafter called "E's share") my Trustees shall hold the same upon protective trusts for the benefit of my daughter E during her life and from and after the death of the said E they shall hold the same in trust for all or any the children or child of the said E who attain the age of twenty-one years or marry under that age if more than one in equal shares.

13. If the trusts hereinbefore declared concerning the share of the trust fund settled on any of my said children C, D or E shall fail such share and every additional share which may accrue or be added thereto by virtue of this present provision shall go and accrue to the share or shares of my other children or child if more than one in equal shares upon and subject to the trusts and provisions declared concerning his or her original share.

Trusts for the maintenance of grandchildren.

14. As to the remaining one equal fourth part (*b*) or share of the trust fund (hereinafter called "the trust share") my Trustees shall hold the same upon trust to pay or apply the income thereof in whole or in part to or towards the maintenance education advancement or otherwise for the benefit of my grandchildren (*c*) or remoter issue for the time being in existence as

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(*b*) The provision in favour of grandchildren and remoter issue can take various forms. The size of the estate and the probable number of grandchildren must be taken into consideration in determining what scheme is most beneficial in the circumstances. In this will the sons take their shares absolutely; it is not therefore possible to make provision for the deduction from such shares of annual sums for grandchildren. Where the shares of children are retained this might be done. In other cases, the whole estate might be charged with the payment of annuities for the benefit of remoter issue in need of education. In the present case, as part of the residue is to be distributed on the widow's death, a fund is set aside to provide for the maintenance of the testator's remoter issue. The size of the fund so set aside must depend on the size of the estate.

(*c*) This can be limited to grandchildren who are under age, as s. 21 does not apply to adult children of a settlor; but on the whole it seems advisable not to restrict the discretion of the trustees. The cost of education frequently continues for some time after twenty-one, and income applied for this purpose, if taken out of such a fund, cannot be aggregated with the parents' income for tax purposes.

they in their absolute and uncontrolled discretion may think fit and upon trust to pay any income not so paid or applied to my children or child then living and if more than one as tenants in common in equal shares [*or*, during the period of twenty-one years from my death upon trust to pay or apply the income thereof in whole or in part to or towards the maintenance education advancement or otherwise for the benefit of my grandchildren or remoter issue for the time being in existence as they in their absolute and uncontrolled discretion may think fit and I direct my Trustees to accumulate any income which may not be so applied in the way of compound interest by investing the same and the resulting income thereof from time to time in any investments hereby authorised and they shall hold such accumulations as an accretion to the capital of the trust share but my Trustees may at any time during the accumulation period apply the accumulations or any part thereof as if they were income arising in the then current year. After the expiration of the said period of twenty-one years my Trustees shall hold the trust share and the said accumulations upon trust to pay and apply the income thereof for the maintenance education advancement or otherwise for the benefit of any grandchild or remoter issue of mine in such shares and proportions as my Trustees in their uncontrolled discretion shall think fit and upon trust to pay any income not so paid or applied to my children or child then living if more than one as tenants in common in equal shares]. From and after the death of the survivor of my said children my Trustees shall hold the trust share [and the said accumulations] upon trust for my grandchildren then living and the children of any then deceased grandchild who whether grandchildren or remoter issue attain the age of twenty-one years or marry under that age as tenants in common in equal shares but so that the children of any deceased grandchild shall take equally between them as tenants in common only the share which their parent would have taken had he or she attained a vested interest AND I HEREBY DECLARE that in deciding what proportion of the income of the trust share is to be paid or applied in favour of my grandchildren or remoter issue under

the powers contained in this clause my Trustees shall have regard not only to the requirements of the object of the power but also to what other income including the income of the parents is available for his or her support and in particular I direct my Trustees (other things being equal) to allow larger payments to objects of the power who are members of a large family preferring them to an only child or to members of a smaller family.

15. I HEREBY DECLARE that no grandchild or remoter issue of mine shall be required to bring into account any sum or sums paid or applied to him or her or on his or her behalf out of the income of the trust share.

16. [*Power to appoint new trustees.*]

17. [*Power for professional trustees to charge.*]

IN WITNESS *etc.*

Form 16.

Agreement as to Demolishing a House or Houses Ordered to be Demolished under the Housing Acts (*a*).

Drafted by F. W. Towns, LL.M., Solicitor.

Date

THIS AGREEMENT is made the —— day of —— 19— BETWEEN

Parties.

A B [*owner*] of *etc.* (hereinafter called "the Owner") of the one part and X Y [*demolition contractor*] of *etc.* (hereinafter called "the Contractor") of the other part

Recitals.

WHEREAS (1) the Owner is the owner of certain premises and buildings situate and numbered (*b*) —— in ——

(2) Under or by virtue of a Clearance Order dated the —— day of —— made and confirmed under the Housing Act 1936 [*or other appropriate statute*] —— [*the local authority*] (hereinafter called "the Local Authority") have ordered (inter alia)

(*a*) It is advisable to draw the agreement in two parts; the original, signed by the contractor, to be retained by the owner and the counterpart or duplicate, signed by the owner, to be retained by the contractor. Stamp (if under hand) 6d. on each part.

(*b*) Here insert short particulars of all the properties to be demolished by the contractor.

that the said premises and buildings be demolished IT IS WITNESSED between the parties hereto as follows:—

1. IN CONSIDERATION of the agreement in clause 2 hereof the Contractor hereby agrees with the Owner and undertakes— Contractor's agreement and undertaking:

(a) to demolish the said premises and buildings and to remove the whole of the materials therefrom and from the site of the said premises and buildings (a) for demolition;

(b) to clear the said site and to seal up the drains sewers watercourses and other services (b) for clearance of site;

(c) to carry out such demolition as aforesaid and to clear and leave the said site in accordance with the stipulations and provisions contained in the Schedule hereto and in accordance with the requirements of the Ministry of Health and of the Local Authority (*c*) (c) manner in which (a) and (b) above are to be carried out;

(d) to indemnify the Owner his estate and effects from and against all expenses costs damages claims and demands (whether arising at common law or under or by virtue of any statute or statutes for the time being in force) in respect or on account of such demolition and site clearance as aforesaid (*d*) (d) for indemnity;

(e) to effect such insurances in some good office of insurance approved of by the Owner against such expenses costs damages claims and demands as aforesaid as may be deemed requisite by the Owner and duly and punctually to pay all premiums and other moneys payable in respect of such insurances and deposit with the Owner the policy or policies of such insurances and the receipt or receipts for such payments (*e*) (e) for insurance;

(f) to carry out the whole of the work as herein provided free of all cost or expense to the Owner. (f) to carry out work free of cost to the owner.

2. IN CONSIDERATION of the agreement and undertaking by the Contractor contained in clause 1 hereof and in consideration Owner's agreement:

(*c*) The requirements of the appropriate local authority should be carefully considered and borne in mind in order to ensure that the work to be done by the contractor will be done to the satisfaction of such local authority.

(*d*) This clause is most important in view of the dangerous nature of the work both to the contractor and his employees and to third parties.

(*e*) See note (*d*) above.

of the sum of £—— now paid by the Contractor to the Owner (*f*) (the receipt whereof the Owner doth hereby acknowledge) the Owner hereby agrees that all materials (whether of marketable value or not) so removed from the said premises and buildings and from the said site by the Contractor as hereinbefore provided shall become the absolute property of the Contractor.

Materials to become the property of contractor.

In witness whereof the parties hereto have hereunto set their hands the day and year first before written.

The Schedule above referred to.

[*Here set out any special provisions and stipulations required by the owner as to the erection of a fence or hoarding around the site, the time within which the demolition is to be completed, etc.*]

Signed by the said A B in the presence of: (*g*)

Signed by the said X Y in the presence of: (*g*)

(*f*) The monetary consideration in these cases is usually small and it is invariably agreed that the materials on the site shall become the property of the contractor.

(*g*) See note (*a*) above.

Form 17.

Deed Providing that as between the Mortgagor and Assignees of Part of the Mortgaged Property the Part Retained by Him shall be Primarily Liable to Discharge the Mortgage Debt (*a*).

THIS DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the first part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part Parties.

WHEREAS: Recitals.

(1) These presents are supplemental to a settlement (hereinafter called "the settlement") made the —— day of —— between the same parties as are parties hereto and in the same order whereby the Settlor assigned to the Trustees all the equitable estate and interest to which he was entitled under the will of X of and in the Z Settled Estates situate at —— in the county of —— or other the property for the time being representing the same To HOLD unto the Trustees subject to the principal sum of £Y and interest charged thereon by a deed of mortgage (hereinafter called "the mortgage") made the —— day of —— between the Settlor of the one part and the —— Assurance Society of the other part and upon the trusts thereby declared

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(*a*) Stamp, 10s. Where two properties are mortgaged to secure the same mortgage moneys and subsequently the mortgagor assigns one of the mortgaged properties to a third person, the question whether the assignee is liable to bear a proportionate part of the burden of discharging the mortgage may be a difficult one to answer. The deed of assignment should make the position clear. Where this has not been done, the general rule is that the properties must contribute rateably to the discharge of the debt: *Re Mainwaring*, [1937] Ch. 96. The authorities show that the general rule will not apply where the debt was created by the assignor, and the assignment contains no mention of the charge, in this case the assignor must indemnify the assignee against the mortgage debt: *Re Darby's Estate*, [1907] 2 Ch. 465; *Re Best*, [1924] 1 Ch. 42, 44. It is in some cases difficult to determine whether the general rule applies, or, owing to special circumstances, the whole liability for the discharge of the debt has been thrown on to the assignor or on to the assignee. If the position is not clear beyond doubt the parties should enter into a deed setting out their respective liability. This deed is intended to meet the case where the intention is that the property retained shall discharge the whole debt. It can be adapted to the case where there is to be a rateable payment.

(2) The mortgage comprised as well the equitable estate and interest of the Settlor to which he was entitled as aforesaid in the Z Settled Estates as certain policies of assurance on the life of the Settlor and belonging absolutely to him (being the policies specified in the Second Schedule to the said mortgage)

(3) The Settlor is desirous that the said sum of £Y and interest shall (without prejudice to the said Society under the mortgage) stand exclusively or primarily charged upon the said policies in exoneration of the said equitable estate and interest under the will of the said X

Covenant.

NOW THIS DEED WITNESSETH that the Settlor hereby covenants with the Trustees that (without prejudice to the said Society as aforesaid) as between the several premises charged by the mortgage the said policies shall henceforth stand exclusively or primarily charged therewith and accordingly that if and so far as the said Society shall enforce its security or exact the payment of any of the said mortgage money or interest out of the equitable estate and interest of the Settlor in the Z Settled Estate the said policies shall stand charged with the recoupment to the Trustees of any payments so exacted by the said Society.

SIGNED *etc.*

Form 18.

Settlement by an Alien Resident in England with a View to Protecting his Property in the Event of War between Great Britain and his Country of Origin (*a*).

Based on a form settled by A. H. Withers, of Lincoln's Inn.

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN —— of *etc.* (hereinafter called "the Settlor") of the one part and —— of *etc.* —— of *etc.* and —— of *etc.* (hereinafter called "the Original Trustees") of the other part Parties.

WHEREAS the Settlor being absolutely entitled to the investments specified in the Schedule hereto and being desirous of settling the same in manner hereinafter appearing has caused or is about to cause the same to be transferred to the Original Trustees to the intent that the same shall be held on the trusts hereinafter declared Recitals.

AND WHEREAS it has been represented to the Settlor by his legal advisers that in settlements of a voluntary nature made without pecuniary or other valuable consideration it is usual and generally proper and advisable that an absolute and unfettered power of revocation should be reserved to the person making the same but the Settlor after carefully considering the representations so made to him by his legal advisers and the amount or value of his property and the circumstances of his family has determined and directed that no power of revocation whatsoever (other than the restricted general overriding power of appointment hereinafter contained) shall be inserted in these presents

(*a*) Stamp *ad valorem*. It is designed to meet the difficulties of alien refugees in this country. There are a number of persons now in England who have removed all their property from their respective countries of origin and intend to become naturalised British subjects as soon as they have been resident here for a sufficient number of years for this to be possible. In the meantime, if war breaks out between this country and their country of origin, they run the risk of losing all the property they have in this country. This settlement is designed to prevent such forfeiture by taking the ownership from the alien immediately war breaks out so that it will not be his property and will not be subject to any wartime provisions. But as the rights of all aliens will in the event of a future war depend on future legislation it is not possible so to settle the property that it will certainly escape any confiscatory legislation.

And whereas it is considered possible that further properties (whether real or personal) may from time to time be paid or transferred by the Settlor his executors or administrators or some other person or persons to the trustees for the time being of this settlement by way of addition or accretion to the property hereby settled or otherwise upon the trusts of this settlement

Witnesseth. Now this settlement witnesseth and it is hereby agreed and declared as follows:—

1. This settlement is made in accordance with the aforesaid desire and determination of the Settlor and for divers good causes and considerations.

Definition clause. 2. In this settlement the following expressions shall have the following meanings namely:—

"The Trustees" shall mean the Original Trustees or the survivors or survivor of them or other the trustees or trustee for the time being of this settlement and (notwithstanding any context) a sole trustee may act for all the purposes of this settlement.

"The said trust property" shall mean and include (a) the investments specified in the Schedule hereto (b) all properties (whether real or personal) at any time or times hereafter paid or transferred to and accepted by the Trustees by way of addition or accretion to the property hereby settled or otherwise upon the trusts of this settlement and (c) the investments and property from time to time representing the aforesaid moneys investments and properties or any of them or any part or parts thereof respectively

"War" shall mean war between Great Britain and ——.

Additional property. 3. With regard to property hereafter added or proposed to be added to the property hereby settled the following provisions shall apply that is to say:—

(a) Without the previous consent of every trustee for the time being of this settlement no property which involves the holder or owner thereof in any personal liability shall be accepted upon the trusts of this settlement

(b) All lands and hereditaments accepted on the trusts of this settlement shall be held by the Trustees upon trust to sell the same at their discretion but with full power to postpone conversion and the net proceeds of sales of

such premises and the rents and profits until sale thereof shall be held on the trusts hereby declared of the said trust property and the income thereof.

Power of appointment.

4. THE TRUSTEES (*b*) shall hold the said trust property and the income thereof UPON TRUST for such person or persons (whether or not being or including the Settlor) for such purposes and with and subject to such powers and provisions and generally in such manner in all respects as the Settlor and any two other persons being trustees or any trust corporation being a trustee or being the sole trustee of this settlement shall by any deed or deeds revocable or irrevocable jointly appoint and in default of and until and subject to any such appointment UPON the trusts and with and subject to the powers and provisions hereinafter declared and contained

PROVIDED ALWAYS that each trustee shall have an absolute discretion to join or abstain from joining in any such appointment as aforesaid without incurring any responsibility in that behalf and that each trustee in considering whether to join or abstain from joining in any such appointment as aforesaid is hereby authorised and requested (but in no sense required) to consider what under all the circumstances of the case is most for the permanent benefit of the Settlor and to give effect to all reasonable requests of the Settlor and to ignore entirely the interests of all other persons interested in any manner under the trusts of these presents.

Power of appointment for settlor.

5. SUBJECT as hereinbefore declared the Trustees shall hold the said trust property and the income thereof upon trust for such person or persons (whether or not being or including the Settlor) for such purposes and with and subject to such powers and provisions and generally in such manner in all respects as the Settlor whilst a British subject shall by any deed or deeds revocable or irrevocable or by will or codicil appoint.

Trusts of income.

6. SUBJECT as hereinbefore declared and to the provisions of the next following clause hereof the income of the said trust property shall be paid to the Settlor until he dies or war

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(*b*) This power of appointment can be exercised in favour of the settlor if this is in his best interests.

commences whilst he is not a British subject whichever event first happens.

Provisions in the event of war.

7. IF WAR commences whilst the Settlor is not a British subject then all income of the said trust property accrued but not received by the Trustees before the commencement of war and the income of the said trust property accruing after the commencement of war and during the residue of the life of the Settlor shall be held upon the trusts following that is to say:—

(a) Upon trust during the life of the Settlor and (as to moneys in hand or accrued at the death of the Settlor) within three years after the death of the Settlor to pay the said income to or apply the same for or towards the discharge of all or any debts or alleged debts or the maintenance and personal support or otherwise for the benefit of all or such one or more to the exclusion of the other or others of the persons mentioned in the next paragraph (b) of this clause if more than one in such shares as the Trustees or a majority in point of number of the Trustees shall from time to time in their absolute discretion think proper and so that any payment or application to or for any particular person or purpose shall continue only so long as the Trustees or such majority as aforesaid shall think fit

Discretionary trusts of income.

(b) The objects of the foregoing discretionary trust are such of the following persons as may from time to time or for the time being be British subjects namely the Settlor and his wife if any and the children and remoter issue of the Settlor's father for the time being in existence whether minors or adults and the spouses of such children and remoter issue respectively and the person or persons in whose company or under whose care or control or by or with whom the Settlor may from time to time be residing travelling or employed and such other person or persons as the Settlor with the previous consent in writing of the Trustees or such majority as aforesaid shall from time to time in writing declare to be an object or objects of such discretionary trust

(c) The Trustees are requested but not required to treat the

Settlor and his spouse and issue as the primary objects of the foregoing discretionary trust and so far as practicable to pay or apply in each year the whole of the income for that year.

Power to appoint life interest to wife.

8. THE SETTLOR may by will or codicil appoint that as from his death or from any later date the income of all or any part or parts of the said trust property shall be paid to any person who may be his wife at his death for the residue of the life of such person or for any less period and subject to any conditions or restrictions he may think fit and any such appointment may provide (due regard being had to the rule against perpetuity) that all or any part or parts of the appointed income accruing during all or any part or parts of the life of such surviving wife shall be paid to or held by such trustees for such period or periods on such discretionary trusts for or between such persons (including such wife) as the Settlor may think fit to appoint or declare

PROVIDED ALWAYS that no such appointment as aforesaid shall take effect if the Settlor dies during a war and such surviving wife is not a British subject at the death of the Settlor

PROVIDED ALSO that if such surviving wife is not a British subject at the death of the Settlor and war commences whilst she is alive and not a British subject no income (whether or not accrued before the commencement of war) shall be paid under any such appointment after the commencement of war.

Trusts of capital.

9. SUBJECT as hereinbefore declared the said trust property shall be held on the trusts following that is to say:—

(a) One third of the said trust property shall be held in trust for —— absolutely but only if (1) he becomes a British subject before war commences or (2) no war commences during the life of the Settlor

(b) Subject as aforesaid the entirety of the said trust property shall be held in trust for —— absolutely.

Powers of trustees: powers of investment;

10. THE TRUSTEES shall have the following powers namely:—

(a) Power to allow the investments specified in the Schedule hereto and all property hereafter accepted by the Trustees upon the trusts of these presents or any of them or any part or parts thereof respectively to remain in

the actual state of investment thereof so long as the Trustees may think fit

(b) Power at any time or times with the consent in writing of the Settlor during his lifetime and after his death at the discretion of the Trustees to sell call in or convert into money the aforesaid investments and property or any of them or any part thereof respectively

(c) Power with such consent or at such discretion as aforesaid to invest the moneys produced by such sale calling in or conversion and any other capital moneys which may be received by the Trustees in respect of the said trust property (when the same respectively shall have been received by the Trustees) in the names or under the legal control of the Trustees in any manner hereinafter mentioned that is to say:—

(i) In any of the public stocks or funds or Government securities of the United Kingdom or India or any foreign country or any British colony (which expression in this clause does not include the Irish Free State but with this exception includes any state dependency dominion or commonwealth) or any province or constituent part of any such colony

(ii) Upon the security of freehold copyhold leasehold or chattel real property in England or Wales or Ireland or of real or leasehold property in Scotland or India or any British colony or any foreign country

(iii) In the purchase of land in England being either freehold or held for a term of which not less than fifty years shall be unexpired at the date of purchase all lands so purchased to be held by the Trustees upon trust to sell the same with such consent or at such discretion as aforesaid and with full power to postpone conversion

(iv) In or upon the stocks funds shares debentures mortgages or securities of any corporation body or company municipal county local commercial or of any other description in the United Kingdom or India or any British colony or any foreign country or

(v) Upon the security of any interest for a life or

lives or determinable on a life or lives or any other event in real or personal immovable or movable property wheresoever situate or arising together with a policy or policies of assurance on such life or lives or against such event.

(d) Power with such consent or at such discretion as aforesaid to vary or transpose any investments into or for any other or others of any nature hereinbefore authorised and to vary the terms of or property comprised in any security — power to vary investments;

(e) Power with such consent or at such discretion as aforesaid to apply any money in the erection alteration improvement or structural repair of any buildings on any land held on the same trusts as the moneys applied thereon under this power

(f) Power (subject as hereinbefore otherwise expressly provided) to determine as the Trustees shall consider just whether any money shall for the purposes of these presents be considered as capital or income and out of what part of the said trust premises and whether out of income or capital any expenses outgoings or losses shall or ought to be paid or borne — power to determine whether assets capital or income;

(g) Power from time to time to appropriate the said trust property or any part thereof in the same manner and with the same consequences as if the Trustees were the personal representatives of a deceased person and were acting under the statutory power of appropriation — power to appropriate;

(h) Power generally to determine as the Trustees shall consider just all questions and matters of doubt arising in the execution of the trusts of these presents so that every such determination whether made upon a question actually raised or implied in the acts or proceedings of the Trustees shall be conclusive and bind all persons interested under these presents. — power to determine questions.

11. The power of appointing a new trustee or new trustees of these presents shall be vested in the Settlor during his life. — Power to appoint trustees.

12. Any Trustee for the time being hereunder being a solicitor or other person engaged in any profession or business — Power for professional trustees to charge.

shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*Investments settled by the above-written deed.*]

Form 19.

Transfer of Freehold Comprising the Whole Title subject to Restrictive Covenants, with Variations for Third Party Joining to Release some of the Covenants (*a*).

Drafted by Harold Potter, LL.B., Solicitor.

County or County Borough ——.

Title Number ——.

Property —— (*b*).

[*Date.*]

1. IN consideration of —— pounds (£——) (the receipt whereof is hereby acknowledged) I, A B of *etc.* (*c*) as Beneficial Owner [*or*, as Trustee, *or as the case may be*] hereby transfer to

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(*a*) See Conveyancer's Notebook, *ante*, p. 193. This is a simple form which is only appropriate where the third party releasing the covenant is the party in whose favour the covenants were originally created. If the ownership of the land benefiting from the covenant has changed hands prior to the release the better method will be to have a transfer with recitals. In this case the opening words will be: "THIS TRANSFER made the —— day of —— 19— BETWEEN etc." followed by the recitals in ordinary form, and the operative part will commence: "NOW THIS TRANSFER WITNESSETH as follows:— 1.", when the deed will follow the form here set out.

(*b*) These details are to be found in the Land Certificate from the Property Register.

(*c*) This is the registered proprietor whose name and address appear in the Proprietorship Register; if the proprietor has changed his address since registration add: "formerly of" giving the address by which he is registered.

C D of *etc.* the land comprised in the title above referred to And it is hereby declared that the covenants which are implied by reason of the said A B being expressed to transfer as Beneficial Owner shall extend to any liabilities rights and interests which by section 70 of the Land Registration Act 1925 are declared not to be incumbrances by the Act (*d*) And the said C D hereby covenants [but by way of indemnity only] with the said A B that he the said C D [and his successors in title] [*or*, during such time as he shall remain owner for the time being of the land hereby transferred] (*e*) will at all times hereafter duly observe and perform the covenants and conditions contained in a deed dated *etc.* and noted on the Charges Register of the property comprised in the title above referred to so far as the same are subsisting and capable of taking effect [and so far as the same are not hereby released in manner hereinafter appearing] and will also at all times keep indemnified the said A B his estate and effects from and against all actions proceedings costs claims and expenses on account of any breach of the said covenants and conditions or any of them (*f*).

2. In consideration of —— pounds (£——) (the receipt *etc.*) I, E F of *etc.* [formerly of *etc.*] (*g*) being the estate owner for the time being in fee simple [*or*, the registered proprietor] (*h*) of the land coloured red in the plan drawn on a deed dated *etc.* as Beneficial Owner hereby release the land comprised in the title above referred to and the said C D and his successors in title from the covenants and conditions contained in the said deed dated *etc.* [and numbered — on the Charges Register of the said title above referred to] [*or, if the restrictions are not set out or numbered on the Charges Register*, more particularly

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(*d*) For the reasons for inserting this clause, see Potter, Registered Land Conveyancing, pp. 68—69.

(*e*) This will depend upon the form of the covenant imposed.

(*f*) For the reasons for inserting this covenant, see Conveyancer's Notebook, *ante*, p. 195.

(*g*) The name and description should agree with that in the deed imposing the covenant; if the releasor has changed his address his present address should be given followed by the address in the deed.

(*h*) If the land benefited is also registered, this form would be more accurate, and the Land Certificate should be lodged at the Registry in connection with this transfer.

described in the Schedule hereto] And the said C D with the concurrence of the said E F hereby applies to the Registrar for the cancellation of the entries on the Charges Register of the land comprised in the title above referred to relating to the said covenants and conditions hereby released.

[*Statutory acknowledgment and undertaking by E F, where appropriate*] (*i*).

[*Certificate of value, if appropriate.*]

[*Executed and attested by all parties.*]

SCHEDULE ABOVE REFERRED TO.

Form 20.

Tenancy Agreement Granted to Husband and Wife Jointly: Protection of Landlord in respect of Distress on Goods on Hire-Purchase (*a*).

Drafted by T. J. Sophian, of the Inner Temple.

AN AGREEMENT made the —— day of —— 19— BETWEEN —— of *etc* (hereinafter called "the Landlord" which expression where the context admits includes the persons deriving title

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(*i*) When this will be necessary is discussed in Potter, Registered Land Conveyancing, pp. 69—70.

(*a*) The object of this agreement is to confer as much protection as possible on landlords whose rights of distress might otherwise be affected by the fact that goods on the premises may be subject to hire-purchase agreements entered into solely by the wife of the tenant, or may be otherwise claimed by the real owners, who having let the goods out on hire-purchase to the tenant have effectively terminated the hire-purchase agreement so as to preclude any effective distress by the landlord.

By making the tenancy a joint tenancy granted to both husband and wife, the landlord will secure that he should not entirely lose his right to distress in respect of goods which are the subject of a hire-purchase agreement by reason of the fact that the hire-purchase agreement has been entered into by the wife or husband as the case may be of the tenant. For if both husband and wife are joint tenants then the fact that only one of them is party to the hire-purchase agreement will not prevent the landlord from distraining on the goods comprised in the hire-purchase agreement: *Gamage* v. *Payne*, 42 T. L. R. 138. But even so the goods may be privileged from distress, if the acts of the owner and other circumstances are such that the goods although still on the premises cannot any longer

under him) of the one part and —— and —— of *etc.* (hereinafter called "the Tenants" which expression where the context admits includes the survivor of them and the persons deriving title under them) of the other part

WHEREBY it is agreed as follows:—

1. THE LANDLORD shall let and the Tenants shall take as joint tenants all that messuage situate at —— with the garden grounds and other appurtenances thereto belonging and the fixtures mentioned in the Schedule hereto on a weekly tenancy at the weekly rent of £— per week the tenancy to commence on Monday the —— day of —— 19— and to be determinable by either the Landlord or the Tenants on any Monday by a week's previous notice.

2. THE TENANTS hereby jointly and severally agree with the Landlord as follows:—

(a) To pay the said rent punctually on every Monday

(b) To use and occupy the said premises as a private dwelling-house only and for no other purpose

(c) To keep maintain and at the end of the tenancy deliver up the said premises together with the said garden grounds appurtenances and fixtures in clean condition and in good repair (damage by accidental fire excepted)

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be said to be "comprised in a hire-purchase agreement". In order that goods may be so comprised, there must still be subsisting at the time of the distress some contractual obligation under the agreement relating to the chattels, and the hire-purchase agreement may be so worded as to give the fullest possible protection in these respects to the owner of the goods: *Smart Bros.* v. *Holt*, [1929] 2 K. B. 303. It is desirable, therefore, from the landlord's point of view either that no goods should be brought on to the premises if they are subject to a hire-purchase agreement at all, or that he should have some control over the form of the hire-purchase agreement if such goods are to be brought on to the premises. This agreement is drafted with a view to attaining these objects as far as practicable.

Restrictive covenants (see sub-para. (k) of clause 2) have accordingly been inserted. As the tenancy here is a weekly one which would be determinable by a week's notice to quit, no forfeiture clause has been inserted, but in the case of tenancies of any length, such a clause would be necessary in order to enable the landlord to avail himself of any such breach and accordingly to forfeit.

As the result of any such breach might be that the landlord may lose his right of distress on the goods, a clause has been inserted imposing an obligation on the tenant to indemnify the landlord fully (see sub-para. (m) of clause 2).

(d) To keep all chimneys sufficiently cleaned and swept

(e) To keep all shutters locks fastenings bells and other internal fixtures in or upon the premises in working order

(f) To replace immediately all cracked and broken glass

(g) To keep all drains cleaned and flushed

(h) Not to assign sub-let charge or part with the possession of the said premises or any part thereof nor to take any lodger [without the written consent of the landlord] (*b*)

(i) Not to do or permit to be done on the said premises or any part thereof any act or thing which may be a nuisance or annoyance or may otherwise cause discomfort to the neighbours

(j) To permit the Landlord at convenient hours in the daytime by himself or his agents or workmen to enter and inspect the state of repair and condition of the premises and to execute forthwith any repairs of which notice in writing shall be given to them by the Landlord

(k) Not to bring or keep upon any part of the said premises any goods or chattels which may be the subject of any hiring or any hire-purchase agreement (whether such agreement be made by the Tenants jointly or only by one or other of them or by a third person or third persons) without first submitting a true copy of the said agreement to the Landlord for his approval of the form thereof and obtaining the consent in writing of the Landlord to the said goods being so brought or kept upon the said premises

(l) To reimburse the Landlord for such expenses (not exceeding £——) as the Landlord might reasonably incur in giving or withholding such approval and/or consent as is referred to in sub-paragraph (k) hereof

(m) In the event of any breach of the agreement contained in sub-paragraph (k) hereof whether such breach be

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(*b*) If the landlord desires to impose an absolute restriction against alienation, the words in brackets should be omitted. If these words are omitted the tenant, it seems, cannot avail himself of the advantages of s. 19 (1) of the Landlord and Tenant Act, 1927.

committed by one or other of the Tenants or by both of them jointly jointly and severally to indemnify the Landlord against all loss that the Landlord might sustain and all expenses that the Landlord might properly incur by reason of the Landlord being unable to distrain upon all or such of the said goods so brought or kept upon the said premises in breach of the said agreement upon which the Landlord might otherwise have been entitled to distrain had the same been distrainable goods and the property of the Tenants or one or other of them and not goods privileged from distress

(n) To pay the sum of £— towards the cost and stamping of this agreement.

3. The Landlord agrees with the Tenants—

(a) To pay all rates and taxes in respect of the said premises

(b) To keep the said premises insured against loss or damage by fire and in case of damage or destruction by fire (unless the insurance moneys shall be found to be irrecoverable through the act or default of the Tenant) to rebuild or reinstate the premises as speedily as possible

(c) That the Tenants paying the rent hereby reserved and observing and performing the several agreements on their part contained shall peaceably hold and enjoy the said premises during the said tenancy without any interruption by the Landlord or any person rightfully claiming under him.

In witness *etc.*

Schedule of Fixtures.

Form 21.

Conveyance on Sale to the Father in Trust for Sale, the Father declaring that he Holds the Proceeds of Sale on Trust for his Infant Child (*a*).

Drafted by Alfred Wilson, Solicitor.

Parties. THIS DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the first part B of *etc.* (hereinafter called "the Purchaser") of the second part and C of *etc.* an infant son of the Purchaser of the third part

Recitals: seisin of vendor; WHEREAS the Vendor (being the estate owner in fee simple and free from incumbrances) has agreed to sell the property hereby assured to the Purchaser for the sum of £Y

agreement for sale. AND WHEREAS the said Purchaser has requested the Vendor to convey the said property in manner hereinafter appearing

Witnesseth. NOW THIS CONVEYANCE WITNESSETH as follows:—

Grant. 1. IN CONSIDERATION of the sum of £Y this day paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as beneficial owner hereby conveys the

Declaration of trust. property described in the Schedule hereto unto the Purchaser in fee simple upon trust to sell the same and apply the income (*b*) from the net proceeds of sale and the rents and profits thereof until sale for the maintenance and education clothing and benefit of the said C during his minority

2. IN THE event of the said property not having been sold the Purchaser shall convey the same and pay any unexpended rents to the said C when he attains the age of twenty-one years.

3. IF THE said trust for sale shall be exercised the net proceeds of sale and any unexpended income therefrom shall be paid to the said C when he attains the said age.

(*a*) Stamp *ad valorem*. As it is not now possible to convey a legal estate in land to an infant (Law of Property Act, 1925, s. 19 (1)), where property is purchased on behalf of an infant it must be conveyed to a trustee. Unless the property is of considerable value, it is generally more convenient to convey it on an express trust for sale rather than to allow it to become subject to the provisions of the Settled Land Act, 1925.

(*b*) It must be remembered that, in view of the provisions of s. 21 of the Finance Act, 1936, the income will be aggregated for purposes of income tax with the income of the father.

4. PROVIDED ALWAYS that if the said C shall die during his minority the trustee or trustees hereof shall hold the said property or the net proceeds of sale and any unexpended rents and income for the sole use and benefit of the Purchaser.

5. THE POWER of appointing a new trustee or trustees of these presents is vested in the Purchaser. Power to appoint trustees.

IN WITNESS *etc.*

THE SCHEDULE.

[*To contain a description of the property conveyed.*]

Form 22.

Deed to give effect to an Arrangement sanctioned by the Court under Section 57 of the Trustee Act, 1925, whereby Investments and Life Policies are Assigned to Trustees in Substitution for the Proceeds of Sale of Investments Paid Over to Beneficiaries (*a*).

THIS DEED OF EXCHANGE AND COVENANT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Husband") of the first part B of *etc.* (hereinafter called "the Wife") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part Parties.

WHEREAS: Recitals.

(1) These presents are supplemental FIRST to a settlement

(*a*) Stamp £1. This transaction is not a settlement of fresh securities but is in effect an exchange of investments, the trustees taking assignments of various properties in exchange for trust capital paid to the beneficiaries. The stamp is therefore 10s. on the exchange and a further 10s. is payable in respect of the covenants. It is now a frequent occurrence for trustees and their beneficiaries to join in an application to the Court under s. 57 of the Trustee Act, 1925, for permission to raise moneys required by a tenant for life or other beneficiary for payment of debts or for other purposes, the moneys so raised being ultimately repaid to the trust by means of policies taken out on the life of the beneficiary or by the transfer of other investments. S. 57 confers the widest powers on the Court to sanction transactions which in the opinion of the Court are expedient. This deed is designed to carry into effect a transaction so sanctioned. Where an arrangement of this character is sanctioned a deed transferring the substituted securities is necessary and containing covenants for the payment of the premiums on policies assigned to the trustees.

dated the —— day of —— and made between the Husband of the first part the Wife (then and therein described as "E spinster") of the second part and the Trustees of the third part being a settlement made upon the marriage of the Husband and Wife and SECONDLY to an Order of the Chancery Division of the High Court of Justice dated the —— day of —— and made in a matter the short title whereof is Re A's Settlement 19— A No. —— by virtue of which Order (*inter alia*) authority was conferred upon the Trustees as trustees of the said settlement (in effect) to release from the trusts of the said settlement for the benefit of the Husband and the Wife a portion of the funds therein described as the Wife's trust fund to a value or amount not exceeding £—— upon having brought into settlement in exchange therefor as well the subjects hereinafter specified and assigned as the investments particularised in the Schedule hereto and upon the terms that the Husband and Wife respectively should make the assignments and enter into such covenants and charge respectively as are hereinafter mentioned (the Wife being thereto authorised by virtue of section 169 (*b*) of the Law of Property Act 1925)

(2) The Husband is absolutely entitled to the said investments specified in the said Schedule and has agreed pursuant to the said Order forthwith to transfer the same into the joint names of the Trustees to be held upon the trusts hereinafter declared

(3) The Wife is absolutely entitled to the principal sum of £—— and interest secured by a legal charge made the —— day of —— between X of the one part and the Wife of the other part

(4) The Trustees pursuant to the said Order are about to sell or are in course of selling investments representing a part of the said Wife's trust fund for the purpose of raising a sum not exceeding £—— to be paid free from the said trusts as aforesaid and for the purposes mentioned in the said Order

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(*b*) Strictly speaking it would seem that a wife restrained from anticipation making an application under s. 57 of the Trustee Act, 1925, need not apply to have the restraint lifted under s. 169 of the Law of Property Act, 1925: see *Re Mair*, [1935] Ch. 562. In some cases resort is, however, had to s. 169, and when this is done the fact should be recited.

NOW THIS DEED WITNESSETH that in pursuance of the said Order and for effectuating such exchange of trust property as aforesaid:— Witnesseth.

1. THE HUSBAND as settlor hereby assigns to the Trustees— Assignment.

(a) All that endowment policy of assurance on his life effected with the —— Insurance Company for the sum of £—— with profits dated the —— day of —— 19— and numbered —— at the yearly premium of £—— and all moneys secured by or payable under the said policy and the full benefit thereof

(b) All that reversionary sum of £—— to which the Husband under the will of Y who died on the —— day of —— 19— is entitled in expectancy upon the death of his father Z

TO HOLD unto the Trustees upon the trusts and subject to the powers hereinafter declared.

2. THE WIFE as settlor hereby conveys and transfers unto the Trustees the benefit of the said legal charge made the —— day of —— TO HOLD unto the Trustees upon the trusts and subject to the powers hereinafter declared.

3. IT IS hereby declared that the Trustees do and shall henceforth stand possessed of as well the premises hereby assigned as the said investments specified in the said Schedule hereto upon the trusts and subject to the powers which under the said settlement are limited with regard to the said Wife's trust fund and subject to such further powers as are conferred by the said Order. Declaration of trust.

4. (A) THE HUSBAND hereby covenants with the Trustees that he will not by any act or omission cause or allow the policy hereby assigned or any policy substituted therefor as hereinafter provided to become void or voidable and will at all times hereafter duly and punctually pay each and every premium payable for keeping on foot the said policy and each of them and any such substituted policy as aforesaid or for restoring the same if and when voidable and if any such policy shall become void will at his own cost effect on his life a new substituted policy or policies with such office and in such names as the Trustees or their successors shall direct and for an amount equal to the Covenant to pay premiums.

amount which would have been payable under the void policy if it had not become void and the Husband had died at the time when it became void and maturing in the like events and at the same time as the void policy would have matured had it not become void and further will within fourteen days after the date on which each such premium shall become due produce to the Trustees or their successors the receipt for such premium or such other evidence of the payment thereof as they may reasonably require

Charge of premiums on life interests.

(B) The Husband hereby charges in favour of the Trustees and their successors with the payment of all premiums and moneys hereinbefore by him covenanted to be paid all the income and life or other interest now or at any time hereafter to be enjoyed by him under the trusts of the said settlement in the property for the time being comprised therein.

5. The Wife in pursuance of the said Order hereby charges in favour of the Trustees and their successors with the payment of all premiums and moneys hereinbefore by the Husband covenanted to be paid all that her income and life interest now or at any time hereafter to be enjoyed by her under the trusts of the said settlement in the property for the time being comprised therein Provided always that no steps shall be taken for enforcing such charge given by the Wife unless and until the Husband shall have failed or omitted to pay some premium or money payable by him under his said covenant within fourteen days after the same shall have become payable or to produce to the Trustees or their successors within such period the receipt for or other sufficient evidence as aforesaid of the payment thereof by him or on his account.

In witness *etc.*

The Schedule.

[*To contain a list of the investments to be transferred to the trustees.*]

Form 23a.

Directions by Residuary Legatees to Executors providing for the Distribution of the Estate between the Legatees and an Additional Beneficiary whose Name was Omitted from the Will by Mistake.

To F. of *etc.* G of *etc.* and H of *etc.* trustees of the will of the late X (deceased).

WHEREAS by her will our aunt the late X bequeathed all her residuary estate in trust for such one or more of us the undersigned and Y (who predeceased the said X) and Z as should be living at her death in equal shares

AND WHEREAS no person called Z was related to the said X or as far as we have ascertained exists and we are satisfied that the said X inadvertently referred to our sister E in the said will as Z and that she intended to benefit E equally with ourselves and our late sister Y

NOW THEREFORE being desirous of carrying out the testatrix's intention WE direct and authorise you to divide the residuary estate of the testatrix into —— equal shares among us and our sister E and we undertake to give you such release and indemnity for so doing as you may hereafter require.

(Signed)

Form 23b.

Deed of Release and Indemnity to the Executors of a Will on the Distribution of the Estate in Accordance with the Directions of the Residuary Legatees (*a*).

THIS DEED OF RELEASE AND INDEMNITY made the —— day of Parties.

(*a*) Stamp 10s. This deed of release is intended to provide for the case where the persons entitled under a will to the deceased's residuary estate have asked the executors to distribute in accordance with their directions. It frequently happens that doubts arise as to the effect of a will or of the intentions of the deceased. Where, as in this case, all the persons entitled to take the residue are *sui juris* and it is merely a question of allowing some additional beneficiary to take a legacy or share of residue, it is not necessary to have a deed of family arrangement, but, if the beneficiaries all join in a request in writing to the executors to distribute in accordance with an agreed scheme of division, the executors can safely so distribute upon being given a proper indemnity as in this deed.

—— 19— BETWEEN A of *etc.* B of *etc.* C of *etc.* D of *etc.* and E of *etc.* (hereinafter called "the Releasors") of the one part F of *etc.* G of *etc.* and H of *etc.* (hereinafter called "the Trustees") of the other part

Recitals: WHEREAS:

Will of testatrix; (1) By her will dated the —— day of —— X (hereinafter called "the Testatrix") after appointing the Trustees executors and trustees thereof and after making certain specific and pecuniary bequests devised and bequeathed all her real and personal estate unto her Trustees upon trust for sale and conversion as therein mentioned and directed that her Trustees should pay her funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by her will or any codicil thereto and the duty or any legacies bequeathed free of duty and should hold her residuary estate in trust for such one or more of the following of her nieces who should be living at her death namely the said A, B, C and D and Y and Z in equal shares

Death; (2) The Testatrix died on the —— day of —— without having altered her said will except by a codicil whereby she gave certain additional pecuniary legacies and the said will and codicil were duly proved by the Trustees in the Principal Probate Registry of the High Court of Justice on the —— day of ——

Payment of debts; (3) The Trustees have duly paid all the debts funeral and testamentary expenses of the Testatrix and the pecuniary legacies bequeathed by her said will

Position in regard to residuary legatees; (4) The said Y predeceased the Testatrix having died on the —— day of ——

(5) The Testatrix never had a niece called Z but it is apprehended that she in fact meant to give a share of her residuary estate to her niece E party hereto who was in error called Z in the said will

Accounts; (6) The Releasors have examined the accounts furnished by the Trustees of their receipts and expenditure in and about the administration of the Testatrix's estate and being satisfied by the correctness of such accounts have duly signed the same

Division of residues. (7) A, B, C and D being satisfied that Z referred to in the Testatrix's will was in fact E by a request in writing dated the

—— day of —— directed the Trustees to divide the residuary estate of the Testatrix into equal shares among them and E and the said A, B, C and D undertook to give to the Trustees such release and indemnity as they might thereafter require

In pursuance of such request the Trustees have duly divided the net residuary estate into five equal shares and have paid or transferred the same to the Releasors in accordance with the said request and direction as the Releasors hereby respectively acknowledge

Now this deed witnesseth that the Releasors do and each of them doth hereby release the Trustees and each of them from the moneys and investments so paid and transferred to them the Releasors respectively and from the income thereof respectively and from all things done omitted or suffered by the Trustees or any of them in or about the administration of the estate of the Testatrix and from all actions accounts claims or demands brought made or claimed or to be brought made or claimed against the Trustees or any of them by virtue of the will or codicil of the Testatrix or her real or personal estate and do and doth covenant to indemnify the Trustees and each of them against all actions proceedings accounts claims and demands incurred or sustained by them in respect of such payments and transfers as aforesaid and against all damages costs and expenses whatsoever consequential upon or incidental to any such action proceeding account claim or demand. Witnesseth.

In witness *etc.*

Form 24.

Conveyance by a Mortgagee in Exercise of his Statutory Powers of Sale of Several Properties Mortgaged to him by Different Mortgagors (*a*).

Drafted by J. Irvine Caulfield, LL.B.(Vict.), Solicitor, of Meltham, Yorks.

This conveyance is made the —— day of —— 19— between Parties.

(*a*) Stamp *ad valorem*. By this conveyance a mortgagee in exercise of his statutory powers of sale conveys several properties mortgaged to him to a purchaser. Generally, where the equities of redemption in

A B of *etc.* (hereinafter called "the Vendor") of the one part and C D of *etc.* (hereinafter called "the Purchaser") of the other part

Recitals. WHEREAS by legal charges the parties whereto and the dates whereof are set out in the second column of the First and Second Schedules hereto (such legal charges being hereinafter referred to as "the legal charges") the premises described in the first column of the First and Second Schedules hereto were charged to the Vendor by way of legal mortgage to secure repayment to the Vendor of the respective principal sums advanced by him under each of the legal charges and interest as therein respectively contained

AND WHEREAS the Vendor has agreed with the purchaser for the sale to him of each of the said properties respectively described in the first column of the First Schedule hereto in fee simple and of each of the properties respectively described in the first column of the Second Schedule hereto for the respective residues now unexpired of the respective terms of years under which the same are held more particularly mentioned in the fourth column of the Second Schedule hereto subject as to all the said properties as hereinafter more particularly appears at the respective prices set forth in the fifth column of the First and Second Schedules hereto

Witnesseth. NOW THIS DEED WITNESSETH as follows:—

1. IN pursuance of the said agreement and in consideration of the sum of £—— (being the aggregate of the said prices set forth in the fifth column of the First and Second Schedules hereto) on or before the execution hereof paid by the Purchaser to the Vendor (the receipt *etc.*) the Vendor as mortgagee in exercise of the powers of sale respectively conferred upon him by each of the legal charges and of every other power him enabling hereby conveys and assigns unto the Purchaser FIRST

Grant.

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mortgaged properties are vested in different persons, a mortgagee should sell and convey the properties separately. There are cases, however, where owing to the nature of the properties several can more profitably be sold together; in this case a mortgagee not only can but should sell the properties together for an aggregate price, but before conveyance the purchase price must be apportioned. See *Re Cooper and Allen's Contract*, 4 Ch. D. 802, 815.

ALL THOSE freehold properties shortly described in the first column of the First Schedule hereto To HOLD the same unto the Purchaser in fee simple subject nevertheless to the payment of the perpetual yearly rentcharges or apportioned yearly rentcharges mentioned in the third column of the First Schedule hereto issuing and payable respectively out of the same premises under and by virtue of the deeds mentioned in the fourth column of the said First Schedule and subject also to all powers and remedies for securing payment of the said respective rentcharges or apportioned rentcharges AND SECONDLY ALL THOSE leasehold properties shortly described in the first column of the Second Schedule hereto To HOLD the same unto the Purchaser for all the respective residues of the terms set out in the fourth column of the said Second Schedule subject to the payment of the respective yearly rents or apportioned yearly rents mentioned in the third column of the said Second Schedule reserved by the respective leases or underleases in that column mentioned and to the full observance and performance of the covenants on the part of the lessee and the conditions contained in the respective leases or underleases under which the same are held so far as the same remain to be paid observed and performed BUT AS REGARDS THE PROPERTY FIRST AND SECONDLY hereinbefore respectively conveyed and assigned subject to and with the benefit of all exceptions reservations powers provisoes covenants stipulations and conditions respectively affecting the same BUT FREED AND DISCHARGED from all rights of redemption and all claims and demands under the legal charges or any of them.

2. (i) THE covenants implied under paragraph (C) of section 77 (1) of the Law of Property Act 1925 shall so far as regards the leasehold properties hereinbefore assigned be incorporated in these presents

(ii) The covenants implied under paragraph (A) of section 77 (1) of the Law of Property Act 1925 shall so far as regards the freehold properties hereinbefore conveyed be incorporated in these presents and apply from the last payment of the said respective yearly rentcharges or apportioned yearly rentcharges.

IN WITNESS *etc.*

FIRST SCHEDULE (FREEHOLDS).

COLUMN 1. *Description of property and document wherein more particularly described.*	COLUMN 2. *Dates of and parties to legal charges.*	COLUMN 3. *Amount of yearly rentcharge or apportioned yearly rentcharge.*	COLUMN 4. *Date of and parties to conveyance creating yearly rentcharge or apportioned yearly rentcharge.*	COLUMN 5. *Price.*
ALL THAT dwelling-house situate at and numbered —— in the county of ——. The site contains an area of —— square yards or thereabouts. Conveyance July 15, 1930. X Y of the one part and M P of the other part.	April 1, 1934. R S of the one part and A B of the other part.	£5 0 0.	Conveyance of Sept. 10, 1898. J K of the one part and S T of the other part.	

SECOND SCHEDULE (LEASEHOLDS).

COLUMN 1. *Description of property and document wherein more particularly described.*	COLUMN 2. *Dates of and parties to legal charges.*	COLUMN 3. *Yearly rents or apportioned yearly rents and leases or underleases reserving same.*	COLUMN 4. *Term of years and date of commencement thereof.*	COLUMN 5. *Price.*
ALL THAT dwelling-house situate at and numbered —— in the county of ——. The site contains an area of —— square yards or thereabouts. Underlease of Dec. 8, 1931, M N of the first part, O P of the second part and Z A of the third part.	November 5, 1935. K L of the one part and A B of the other part.	£4 10 0 said underlease of December 8, 1931.	990 years from December 8, 1931.	

Form 25.

Covenant to Pay Annuity, with Special Proviso for Reduction or Cesser of the Annuity if the Annuitant Inherits further Property (*a*).

Drafted by S. L. Bathurst, of Lincoln's Inn.

THIS DEED OF COVENANT made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Grantor") of the one part and C D of *etc.* (hereinafter called "the Annuitant") of the other part WITNESSETH that for divers good considerations him hereto moving the Grantor hereby covenants with the Annuitant that he the Grantor in each year during the joint lives of the Annuitant and himself will pay to the Annuitant an annuity of £*x* to commence as from the 1st day of January 19— and to be paid by equal quarterly payments on the 1st day of April the 1st day of July the 1st day of October and the 1st day of January in each year the first quarterly payment (being a full quarterly payment) to be made on the 1st day of April 19— if the Grantor and the Annuitant both then shall be living PROVIDED ALWAYS that if during the said joint lives the Annuitant shall be or become entitled for any period not being less than the said joint lives to any annuity or annual sum (other than the annuity hereby covenanted to be paid) or other income (including income arising from any real or personal estate to which the Annuitant may be or become entitled in possession for any estate or interest not being less than the said joint lives) then

(a) If at any time during the joint lives the aggregate yearly amount to which the Annuitant so shall be or become entitled shall amount to £*y* per annum but be less than £*x* per annum the annuity hereby covenanted to be paid shall thenceforward be reduced to £*z* per annum and

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(*a*) Stamp *ad valorem* 2s. 6d. for every £5 of annuity. This form was drafted to meet a case where there is a probability that the annuitant may come into independent property during the joint lives of the covenantor and annuitant. If the annuitant is a child of the grantor the grantor will not during the annuitant's minority be entitled to claim any reduction of surtax in respect of the annuity.

(b) If at any time during the said joint lives the aggregate yearly amount to which the Annuitant so shall be or become entitled shall amount to or exceed £*x* per annum the annuity hereby covenanted to be paid thenceforward wholly shall cease

AND IT IS HEREBY DECLARED that for the purposes of this proviso the Annuitant shall be deemed to be entitled to any annuity or other annual sum or income directed to be held on protective trusts for his benefit during the whole period during which the same is directed so to be held.

IN WITNESS *etc.*

Form 26.

First Codicil providing for Money Advanced or to be Advanced to a Private Limited Company in which Some of the Beneficiaries under the Testator's Will are Interested to be Brought into Hotchpot.

Drafted by Frederick William Kay, Solicitor, of Rochdale.

I [*testator*] of *etc.* DECLARE this to be a first codicil to my will which bears date the —— day of —— 19—

WHEREAS by my said will I have bequeathed certain legacies and have given directions to my Trustees as to the division of my residuary estate Now

1. I HEREBY DECLARE that any person who may participate under my will shall bring into hotchpot against the capital of his or her share the following (a) any sum or sums of money which I may since the —— day of —— 19— have given to such person and (b) in the case of any such person or beneficiary under my said will being also a shareholder member or director of [*name of company*] Limited a private limited company incorporated under the Companies Acts all money (or if more than one beneficiary is also a member of such company as aforesaid) a proportionate share (calculated as hereinafter mentioned) of all money which I have advanced or may hereafter advance on [unsecured] loan to the said —— Limited if such money shall not be repaid to me in my lifetime or to my trustees within three

months of my death (whether such repayment is demanded by my trustees or not) The amount which any such person or beneficiary is required to bring into hotchpot in respect of the last-mentioned loan shall be calculated with reference to the number of such persons as shall be both participating beneficiaries under my said will and shareholders members or directors of the said —— Limited and shall be in the same ratio as the amount owing by the said company bears to the total aggregate amount of the interests of all such beneficiaries under my said will AND I DECLARE that on such beneficiary or beneficiaries bringing such proportion of the said loan into hotchpot as aforesaid my trustees shall on the distribution of my estate transfer the said loan owing by the said company to such beneficiary or proportionately between such beneficiaries as the case may be.

2. IN all other respects I confirm my said will.

IN WITNESS *etc.*

Form 27.

Strict Form of Agreement for Building Lease applicable to Cases where Existing Buildings upon the Site are Let. Provisions for: Deposit of Substantial Sum as Security—Payment of Rent by Tenant as from Date of Agreement—Tenant Obtaining Vacant Possession of Site—Pulling Down of Old Buildings and Erection of New Ones—Ascertainment of Damages—Guarantors (*a*).

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression Parties.

(*a*) This form was settled by Mr. A. L. Burford. Stamp 6d. This form is intended to meet the needs of a case where it is essential that the landlord should not be at a loss of revenue pending the completion of the works. Illustrations of such cases occur—

(a) where the existing buildings are let, but the new buildings will be used for an entirely different purpose;

(b) where the existing buildings are let and the rents provide the sole or principal source of the landlord's income. In such cases endeavour should be made to obtain a substantial deposit by the building tenant. In all respects the form of agreement is intended to give the landlord a maximum of protection and it will depend upon the circumstances of each particular case whether some of the stringent conditions can be waived.

where the context so admits shall include the reversioner for the time being immediately expectant on the term hereby agreed to be created) of the first part B of *etc.* (hereinafter called "the Tenant" which expression where the context so admits shall include his successors in title) of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Guarantors" which expression shall include their respective executors and administrators) of the third part

WHEREBY IT IS AGREED as follows:—

Interpretation clause.

1. IN these presents the following expressions shall have the following meanings assigned to them:—

(a) "the site" shall mean the piece of land described in the First Schedule hereto and delineated upon the plan annexed hereto and thereon coloured —— and edged ——

(b) "the date for commencement of building work" shall mean the day which shall be the third day next after the date on which the Tenant shall have

(i) complied with all h obligations under clauses 4 and 6 hereof and

(ii) obtained complete vacant possession of the site and satisfied the Landlord's solicitors that such possession has been obtained

(c) "the said leases" shall mean the leases specified in the Second Schedule hereto or such of them as shall for the time being be subsisting

(d) "the old buildings" shall mean the buildings works walls fences and erections standing upon the site at the date hereof

(e) "the plans" shall mean the plans elevations sections and specification of the new buildings hereby agreed to be erected.

Right to enter for execution of works.

2. SUBJECT to the provisions hereinafter contained the Tenant shall have licence and authority to enter upon the site but only for the purpose of carrying this agreement into effect.

Restriction against execution of works until "date for

3. UNTIL the date for commencement of building work the Tenant shall not be entitled to pull down or remove the old buildings or any part or parts thereof or any fences walls or

other erections or remove anything from the site or from the old buildings.

commencement of building work".

4. The Tenant shall on the date hereof deposit in the joint names of the Landlord's solicitors Messrs. —— and the Tenant's solicitors Messrs. —— with —— Bank Ltd. of *etc.* the sum of £—— and such sum shall be held as security for the due performance of this agreement.

Deposit of money as security for performance of agreement.

5. As from the date hereof and until the date when the lease hereinafter referred to is due to be granted or the rescission or determination of this agreement under either of clauses 8 or 12 (A) (ii) hereof (whichever shall first happen) the Tenant shall pay to the Landlord quarterly (and so in proportion for any period less than a quarter) on the usual quarter days such an amount as shall with the rents (other than insurance rents) actually received by the Landlord on each quarter day in respect of the said leases make up the total quarterly sum of £—— The first of such payment shall be made on —— day of —— and the payment in respect of the last quarter shall be a proportionate payment calculated from the last preceding quarter day up to the due date for the grant of the said lease or the rescission or determination of this agreement (as the case may be).

Agreement by tenant to pay quarterly such an amount as will make with the rents received under subsisting leases the agreed total rent (*b*).

6. The Tenant shall forthwith after the date hereof proceed to comply with all the obligations imposed by the following sub-clauses namely:—

Agreement by tenant as to easements rights of light, etc., enjoyed by adjoining owners and occupiers and as to obtaining the necessary approvals of plans, etc.:

(a) deposit with the Landlord such drawings plans elevations and sections of the old buildings as the Landlord or h architect may consider necessary and also if the Landlord or h architect shall so require photographs giving complete views of the old buildings in front and rear and showing their relation to adjacent buildings

(a) to deposit plans, photographs, etc., of existing buildings;

(*b*) This covers a case where a rent, in excess of the rents received by the landlord from existing lettings, is to be paid by the building tenant as from the date of the agreement, subject, however, to the building tenant getting the benefit of the existing rents meanwhile. If the rent payable by the building tenant is not to commence as from the date of the agreement, the clause should still remain, but the figure inserted should be the amount receivable by the landlord from the existing lettings as it is conceivable that some of the occupying tenants might either withhold their rent, or vacate as a result of interference by the building tenant.

(b) to satisfy landlord as to easements enjoyed by adjoining properties;

(b) satisfy the Landlord's architect (with reasonable and proper evidence) that the fullest possible inquiry has been made by the Tenant into the question of pipes wires drains and sewers in or under the site serving other land or property and of rights of light and other easements or rights enjoyable by the owners or occupiers of adjoining or neighbouring property and (with such evidence as aforesaid) also satisfy the Landlord's architect that no difficulties will arise in relation to any of the foregoing matters and in so far as any rights of owners or occupiers of adjoining or neighbouring property will be infringed or interfered with by the works and buildings hereby agreed to be carried out and erected that satisfactory arrangements have been made with such owners and occupiers And it is agreed that until the Landlord's architect shall in writing inform the Tenant that he is satisfied as to all matters arising under this sub-clause the Tenant shall not be deemed to have complied with this clause

(c) to submit plans to landlord for approval;

(c) submit to the Landlord for h approval and obtain the approval by the Landlord of the plans (which approval the Landlord may grant or refuse in h absolute discretion) and sign and leave with the landlord for reference copies of the plans as approved

[notwithstanding that the Landlord is the owner of the adjoining land and premises situate to the —— and —— of the site approval of the plans by the Landlord shall not be deemed to operate as a waiver or release of any rights which the Landlord or occupiers of any adjoining land or premises may have in consequence of any interference with or diminution of the flow of light and air to such adjoining land and premises caused by the new buildings proposed to be erected upon the site and the Landlord shall be treated as having the same rights in these respects as if h were not the Landlord (*c*)]

(*c*) This is only applicable if the landlord owns adjoining properties.

(d) submit to the Landlord for approval by h solicitors and architect the draft of the building agreement to be entered into by the Tenant with Messrs. —— (building contractors) and obtain such approvals by the Landlord's said solicitors and architect and subject to such approvals being obtained satisfy the Landlord's said solicitors that such building agreement has been entered into and completed in accordance with such approved draft and hand to the Landlord's said solicitors the part of the said building agreement signed by or on behalf of the said Messrs. —— and satisfy the Landlord's solicitors that the requisite finance has been arranged for the payments to be made thereunder

(d) to submit building agreement to landlord's solicitors and architect for approval;

(e) obtain the under-mentioned approvals indication and consents and satisfy the Landlord upon reasonable evidence that the same have been obtained namely:—

(e) to obtain approval of plans by various authorities.

(1) the approval of the plans by the local authority in connection with the building bye-laws and by the town planning authority and the county council so far as approval by such council shall be necessary and

(2) such consents as shall by the Restriction of Ribbon Development Act 1935 be required in connection with the proposed new buildings from the authority having power to issue the same and

[(3) an indication from the licensing authorities (if the same shall be procurable) that upon such proposed new buildings being erected in accordance with the approved plans the requisite cinematograph music and dancing and stage play licences will be granted Provided that if any licensing authority shall require the plans to be amended or shall give an indication that it would not be prepared to grant the requisite licences except upon the plans being amended and the buildings being erected in accordance with such plans as amended the plans though previously approved under subclauses (c) and (e) hereof shall not be deemed to be approved until they have (as amended to comply with the licensing authorities' requirements or indication)

been re-approved under sub-clauses (b) and (c) hereof (*d*).]

Agreement by tenant to obtain possession and the course to be followed in obtaining it.

7. The site is held by the Landlord subject to the tenancies created by the said leases and to any sub-tenancies created under the said leases The Tenant shall be fully responsible for obtaining possession of the site and for all expenses costs and compensation incurred or payable in connection therewith and the Tenant shall use his best endeavours to obtain possession before the expiry of the period mentioned in the next clause hereof For the purpose of obtaining possession the following provisions shall apply:—

(a) It being agreed by the tenant that it is of the utmost importance that the continuance of the tenancies subsisting under the said leases should not be jeopardised or in any way interfered with until the Tenant shall have procured the approval of the plans and the consents and indication mentioned in clause 6 hereof the Tenant shall (i) before proceeding to get possession of the site first comply with all his obligations under clause 6 hereof or (ii) in arranging to obtain possession make such arrangements conditional upon the Tenant obtaining the approvals indication and consents mentioned in sub-clauses (c) (d) and (e) and complying with sub-clause (b) of clause 6 hereof

(b) Subject to the provisions of the last sub-clause hereof

(*d*) This clause is relevant only if the new buildings will be licensed premises such as a theatre or cinema. It will be appreciated that licensing authorities (County or local Councils and Justices) have no power to grant Cinematograph licences in respect of a building not yet erected and consequently they may refuse to give, before building work commences, an indication either as to their requirements in regard to the construction of the building, or whether they would be prepared ultimately to grant a licence. (See *R.* v. *Barnstaple JJ.*, 107 L. J. K. B. 127.) Practice, prior to this case, has shown that licensing authorities are generally anxious to make known their views upon the plans of a proposed new building, or the reconstruction of an existing building, and it remains to be seen whether they will now continue to assist as hitherto. It is, however, clearly desirable for all concerned, and particularly for the Landlord, to know that the plans meet with the approval of the licensing authorities and, notwithstanding that an approval, if given, will not bind the Licensing authority, an effort should be made to obtain the approval if it can possibly be obtained.

and to the Tenant having complied with the provisions of clause 4 hereof the Tenant shall be at liberty to negotiate direct with the persons firms or companies interested in the site as tenants or under-tenants for the purpose of acquiring their interests in the site and obtaining complete vacant possession thereof

(c) The Tenant shall in obtaining possession of the site do no act or thing which may be likely to give rise to or result in any proceedings being taken against the Landlord in respect of any covenant for quiet enjoyment or otherwise contained in the said leases and if any proceedings claims or demands shall be made against the Landlord by any person claiming an interest under the said leases in consequence of any act or thing done by the Tenant and/or in pursuance or exercise of any alleged right under the Landlord and Tenant Act 1927 the Landlord shall not as to any proceedings at law be bound to defend the same (but may do so if h so decides) and the Tenant shall whether the Landlord shall defend any such proceedings or not keep the Landlord indemnified from and against any losses costs charges damages or other expenses which may be suffered or incurred by the Landlord in respect of any such proceedings claims and demands

(d) The Tenant shall satisfy the Landlord's solicitors upon reasonable evidence that the Tenant has acquired all the interests of the persons claiming to be entitled to any interest in the site as the tenant or under-tenant of any part thereof.

8. If the date for commencement of building work shall not have arrived before —— months from the date hereof then the Landlord may at any time after the said —— months from the date hereof serve upon the Tenant a written notice rescinding this agreement but such rescission shall be without prejudice to any right of the Landlord in respect of any breach or non-performance by the Tenant of his obligations hereunder and so

Right for landlord to rescind if date for commencement of building work has not arrived before an agreed period of time (*e*).

(*e*) The object of this clause is to give the landlord a right to terminate the agreement if it becomes apparent that possession cannot be obtained

that the indemnity next hereinafter contained shall thereupon take effect and no costs compensation or otherwise shall be payable to the Tenant.

Indemnity in respect of any loss of rent or otherwise which landlord may suffer until an agreed date if the agreement is rescinded under last clause.

9. (A) In the event of this agreement being rescinded as last mentioned the Tenant shall as from the date of such rescission until the —— day of —— reimburse to and indemnify the Landlord against

(a) all losses or expenses which the Landlord may suffer or incur by reason of or resulting from any arrangements made by or on behalf of the Tenant with any person entitled to the said leases or any of them or any interest in any such lease whether in respect of—

(i) the non-payment of any rents payable under such leases or any of them or in respect of the non-performance or non-observance of the covenants and conditions on the part of the lessees contained in the said leases or

(ii) any proceedings taken by the Landlord on account of any such non-payment non-performance or non-observance against any of the tenants under the said leases

(b) all costs charges expenses and fees of the Landlord's solicitors and architect properly incurred up to the date of such rescission

(B) For the purpose of implementing and not for the purpose of discharging this indemnity the said deposited sum referred to in clause 4 hereof shall after rescission of this agreement be applicable in or towards the satisfaction of any loss which shall be suffered or expense incurred by the Landlord and accordingly on any such loss being suffered or any such expense being incurred an amount sufficient to make good such loss or expense (together with interest thereon at 5 per cent. per annum from the date of such loss or expense) shall be released to the Landlord from the said deposited sum Upon the obligations of the Tenant and the Guarantors under this agreement being fully discharged

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or the tenant is unable to proceed or for any reason fails to proceed with the matters which are to be complied with by him before he is entitled to commence the building work.

the said deposited sum or so much thereof if any as shall then remain shall be released to the Tenant

(C) For the purpose of ascertaining whether a loss shall have been suffered by the Landlord it shall be assumed that had not this agreement or any arrangement by the Tenant for the purpose of obtaining possession of the site been made the respective tenants under the said leases would have faithfully and punctually performed and observed all the lessees' covenants and conditions contained in the said leases

(D) For the purpose of this present clause and clause 5 hereof a certificate from [the Tenant's solicitors] [Messrs. —— of *etc.*] who now collect the rents payable under the said leases shall so long as they continue to collect such rents be accepted (except as to obvious error) as conclusive evidence of the amount collected in respect of the rents payable under the said leases.

Agreement to remove old buildings and the conditions applicable thereto.

10. Upon the date for commencement of building work the Tenant shall forthwith proceed to pull down and remove the old buildings in accordance with the following:—

(a) Before actually commencing to pull down the old buildings the Tenant shall obtain all necessary approvals and consents for the works and set up sufficient hoardings and enclosures and both before during the course of and after pulling down and removing the old buildings shall perform all the shoring and other works necessary to uphold all adjoining buildings and shall take all necessary steps to comply with the requirements in relation to such pulling down of all statutes and of all local or other competent authorities and shall pay all fees and charges required for any such purposes

(b) The Tenant shall entirely remove the old buildings and materials thereof and shall clear out the site of the old buildings (but not deeper than is required for the foundations of the buildings and works agreed to be constructed) and as to cesspools or drains upon the site not required for any purpose shall solidly fill in the same with concrete all such work to be done within —— months from the date for commencement of building work

(c) The Tenant shall not in the course of pulling down the old buildings or of the erection of the new buildings or any other works hereby agreed to be carried out cause or allow any nuisance or do or permit anything which shall cause any unnecessary annoyance or disturbance to the occupiers of adjacent premises and shall pay and indemnify the Landlord against all claims for damage or injury to property or persons done in the course of such pulling down or otherwise arising from or in connection with or as a result of the works authorised by this agreement or anything done or omitted in the course of or in preparation for such works and also all claims and demands in respect of any alleged interference with or disturbance of light air or other rights or easements claimed by any person including the lessees tenants or occupiers of any adjoining property [owned by the Landlord]

(d) If it shall be found that any drains sewers pipes wires or other things used by or in connection with or servicing any adjoining properties pass through or under such part of the site upon which the new buildings (hereinafter referred to) will be erected and/or that any such drains sewers pipes wires or other things used by or in connection with or servicing any such adjoining properties are connected with or jointly used by or in connection with the old buildings then the Tenant shall carry out such work as is necessary for the purpose of diverting any such drains sewers pipes wires or other things so that they do not pass under and are not connected with the new buildings when erected and/or for effectively disconnecting them from the old buildings (as the case may require) such work of diversion and disconnection to be carried out in accordance with the requirements for the time being of the competent authorities

(e) The Tenant shall execute all works that may in the opinion of the Landlord or h architect be necessary for the repair and maintenance of the party walls

between the old buildings and other adjoining buildings

(f) Generally the Tenant shall execute all such works in accordance with all reasonable requirements of the Landlord's architect.

Agreement to erect new buildings and conditions applicable thereto.

11. IMMEDIATELY after the removal of the old buildings and the filling in according to the conditions and stipulations contained in clause 10 and the written approval of all such works by the Landlord's architect has been given the Tenant shall with all reasonable speed proceed to erect the new buildings and execute the new works on the site in accordance with the following conditions and stipulations that is to say:—

(1) The Tenant shall erect a —— and with all proper offices outbuildings drains sewers and appurtenances (hereinafter called "the new buildings") The new buildings shall be erected in a substantial and workmanlike manner with new and sound materials of the best of their several kinds to the satisfaction of the Landlord or h architect and all competent authorities and in accordance with the plans approved as aforesaid and the drainage of the new buildings shall be independent of the drainage of any adjoining property The Tenant shall complete the new buildings and lay all requisite pipes wires and other necessary conduits for the supply of gas and electricity for lighting and power to the new buildings and throughout the same and completely equip [and furnish] the said —— in a proper and workmanlike manner with all necessary usual or proper materials and articles of equipment [and furnishing] such materials and articles to be new of sound quality and of sufficient quantity and size for the full and effective equipping [and furnishing] of the said —— and shall include the installation of [a new and up-to-date —— apparatus which and together with] all [other] requisite electrical installations [which] shall be installed in accordance with all regulations for the time being in force The said new buildings shall be completed [and] equipped [and furnished] in all

respects fit for immediate occupation and passed by all the competent authorities [and the cinematograph stage play and music and dancing licences obtained] within the period of —— months from the date for commencement of building work and the Tenant in erecting and completing the new buildings and in equipping [and furnishing] the same shall expend thereon in the cost price of materials and labour alone a sum of £—— at least and if required shall produce to the Landlord or h architect proper vouchers for such expenditure

(2) If in the course of erecting and completing the new buildings or in equipping [and furnishing] the same the Tenant shall use any materials or execute any work which the Landlord or h architect shall consider unsound or unfit for the purpose intended or imperfect or if any deviation shall be made from the plans so approved the Tenant shall immediately upon notice signed by the Landlord or h architect requiring h so to do remove all such unsound or unfit materials and substitute such sound or fit materials as shall be approved of by the Landlord or h architect and make good such imperfect work and correct such deviations And if the Tenant shall neglect so to do for the space of seven days after such notice then it shall be lawful for the Landlord h agents and workmen to remove the unsound and unfit materials and to substitute therefor such as shall be sound and fit and to make good the imperfect work and to correct every such deviation and all h expenses of so doing shall be paid by the Tenant on demand with interest from the date of outlay to the date of payment by the Tenant at the rate of £5 per cent. per annum

(3) The Tenant shall erect and complete the new buildings under the inspection of the Landlord's architect (who shall be at liberty for that purpose to enter upon the site and all buildings thereon at all reasonable times) and also in accordance with the provisions of any statute applicable thereto and the regulations of any

local or other authority having jurisdiction to regulate the same

(4) The Tenant will not sell or dispose of any earth clay gravel or sand from the site nor shall any of the same be removed except so far as shall be necessary for the execution of the said works but he may use for the purposes of the said works any of the before-mentioned substances which may be excavated in the proper execution of the works

(5) The Tenant shall pay all fees payable to any surveyor employed by a public authority and all other fees and payments properly claimed by such authority and also shall indemnify the Landlord against all proper and usual fees and charges of the Landlord's architect for work done by him in preparing or approving plans or inspecting the execution of works or otherwise in connection with the carrying out of the works authorised by this agreement and shall pay and discharge such fees and charges

(6) The Tenant shall not assign or part with h interest under or the benefit of this agreement or of any part thereof without the previous consent in writing of the Landlord and in case of any permitted assignment he shall continue liable for the performance of the several stipulations herein contained until the grant of the lease.

Rights of the landlord during building work :

12. (A) IT IS HEREBY FURTHER AGREED that after the date for commencement of the building work and until the Tenant has completely executed and performed the aforesaid agreement to erect the new buildings and execute the works in accordance with the stipulations and conditions contained in clauses 10 and 11 the Landlord may if the new buildings hereby agreed to be erected shall not be completed [and] equipped [and furnished] fit for immediate occupation within the period hereinbefore limited or if the Tenant shall neglect to proceed continuously and diligently with the works to be executed by h in accordance with the provisions hereof or if the Tenant shall in any other way fail to perform and observe the stipulations on h part herein

contained (instead of the Landlord exercising any of h other rights hereunder) re-enter upon and take possession of the site and all buildings erections fixtures plant chattels and effects whatsoever thereon and may either

to re-enter and complete works;

(i) As agent for and on behalf of the Tenant carry out execute and complete all the works hereby agreed to be carried out executed and completed by the Tenant with liberty (if the Landlord shall think fit) to agree with any person or persons any modification of any building agreement or other agreement entered into by the Tenant relating to the works to be executed by him under this agreement (hereinafter in this clause called "construction agreements") and to employ contractors builders workmen and others and to purchase all proper materials as the Landlord may in h absolute discretion think fit or

to re-enter and dispose of buildings, materials, etc.

(ii) hold and dispose of all buildings erections fixtures and fittings on the site as h absolute property without making any compensation or allowance to the Tenant therefor or for any other payment made by the Tenant pursuant to h obligations hereunder or in respect of any breach thereof

PROVIDED that—

Notice as to which right of re-entry is exercised to be conclusive evidence.

(a) If the Landlord shall before re-entering in pursuance of this clause give to the Tenant written notice and shall state therein which of the two rights hereinbefore given to h by this clause the Landlord is exercising such notice shall on the Landlord re-entering be conclusive evidence as to the right which the Landlord has exercised

Any moneys expended by landlord to be repaid with interest.

(b) Any moneys expended by the Landlord under this clause or under any other provision contained in these presents shall on demand be repaid by the Tenant to the Landlord with interest thereon at the rate of £5 per cent. per annum from the respective times at which such moneys shall have been expended and until repaid to the Landlord

Landlord's architect's

(c) The certificate of the Landlord's architect as to any

moneys expended by the Landlord under this clause shall be accepted as conclusive evidence

certificate to be final.

(d) Upon the Landlord taking possession under this clause the said deposited sum of £—— and all interest which may have accrued thereon shall thereupon become the absolute property of the Landlord and be forthwith released and paid to h accordingly but if the Landlord shall proceed to complete the works hereby agreed to be executed by the Tenant the Landlord shall in any claim for moneys expended by the Landlord or for any other loss suffered by h as a result of a breach of this agreement by the Tenant give credit for the amount actually received by the Landlord by the release to h of the deposited sum

Deposit to be released to landlord.

(e) If the Landlord shall re-enter under this clause such re-entry shall be without prejudice to the Landlord's remedies for recovery of rent or money due to h from the Tenant or in respect of any breach of this agreement

Re-entry to be without prejudice to landlord's other rights and remedies.

(B) THE Tenant hereby irrevocably appoints the Landlord to be the Tenant's attorney and for the Tenant and in h name or otherwise on h behalf and as h act and deed or otherwise to perform or cause to be performed all or any of the obligations of the Tenant under any construction agreement h may enter into relating to the works to be carried out in pursuance of these presents and/or to enforce performance of the obligations contained in any construction agreement by the parties thereunder contracting with the Tenant and/or the obligations of any guarantor or surety under any construction agreement with power for the Landlord to make any payment by way of consideration for or expenses of works carried out or to comply with any such construction agreement or matter incidental or ancillary thereto and to sign or sign seal and deliver and otherwise perfect any document or deed for any of the purposes aforesaid and any person dealing with the Landlord shall not be bound or entitled to inquire whether any act or event has occurred or happened entitling the Landlord to operate under the power

Landlord appointed attorney.

hereby conferred but any such person may and shall assume that such power has become exercisable and in favour of any such person any purported exercise of such power by the Landlord shall for all purposes be valid and effective

Extension of time in respect of strikes, etc.

(C) PROVIDED NEVERTHELESS that if such default as aforesaid in completing the said buildings and works shall be attributable solely to labour disputes affecting workmen employed on the said works or any workmen employed in any trade generally relating to the building trade then the Landlord shall allow such further time for the completion of the said works as the Landlord's architect shall in writing certify to be reasonable

Proviso for substitution of new completion date.

(D) PROVIDED FURTHER that notwithstanding any such default as aforesaid and notwithstanding anything hereinbefore contained the Landlord may in h discretion give notice in writing to the Tenant of h intention to enforce the Tenant's obligations herein contained and may fix any extended period for the completion of the said works in substitution for the said period of —— months hereby fixed for such completion and thereupon the obligations hereunder of the Tenant to complete the said works and to accept a lease as hereinafter mentioned shall be taken to refer to such substituted period.

Insurance.

13. THE Tenant shall so soon as any building shall have reached a height of twenty feet above the ground level insure the same against damage by fire in the —— Office Limited in the joint names of the Landlord and Tenant to the full value thereof as certified by the Landlord's architect and shall increase such insurance to the satisfaction of the said architect as the said buildings approach completion and shall keep the same so insured from time to time and shall whenever required produce to the Landlord the policy or policies of such insurance and the receipt or receipts for the premium or premiums and in case default shall be made in effecting any such insurance or in producing such policy or policies receipt or receipts the Landlord may insure such buildings and the expenses incurred in so doing shall be recoverable from the Tenant on demand In case the new buildings or any part thereof shall be destroyed or damaged by fire the Tenant shall lay out to the satisfaction of the Landlord or h said architect all the money which shall be received

by virtue of any such insurance immediately after the receipt thereof together with any further sum of money which may be requisite for the purpose of rebuilding or reinstating the said buildings.

Tenant to be tenant at will until lease granted.

14. Until a lease is granted or is due to be granted in accordance with the regulations stipulations and conditions of this agreement the Tenant shall subject in all respects to the said leases be a tenant at will of the site hereby agreed to be leased to him but shall pay all rent hereby reserved and indemnify the Landlord against all rates taxes charges and outgoings.

No advertising station, etc.

15. The Tenant shall not use or permit to be used any portion of the site or any buildings or hoarding thereon or anything connected therewith as an advertising station or for the display of boards posters or notices.

Provision as to grant of lease and release of deposited sum.

16. If the said works shall be completed to the satisfaction of the Landlord's architect at the expiration of the said period of —— months from the date for commencement of building work or of such extended period as shall be allowed or fixed by the Landlord under clause 12 (C) and (D) (such satisfaction to be testified by the architect's certificate in writing which shall not be unreasonably withheld) and the Tenant shall have paid all rent and other sums payable by him under this agreement and shall have observed and kept all the stipulations herein on h part contained other than such as may have been waived under clause 12 (D) hereof then on the grant of the said lease the said deposit of £—— or so much thereof as shall remain and all interest accrued thereon shall be repaid to the Tenant and the Landlord shall grant and the Tenant shall accept and execute a counterpart of a lease of the site together with the buildings so erected thereon with their appurtenances for the term of —— years from the —— day of —— at the net yearly rent of £—— payable in equal quarterly payments on the usual quarter days in every year The lease shall be in the form of the draft set forth in the Third Schedule hereto or with such modifications therein as the parties may agree upon or circumstances may render necessary and as from the date when such lease is due to be granted the Tenant shall pay the rent thereby reserved and perform and observe the covenants on the part of the lessee and

conditions therein contained in like manner in all respects as if such lease had been actually granted.

Tenant to pay landlord's solicitors' costs.

17. The Tenant shall keep the Landlord indemnified against all costs charges and expenses properly payable to the Landlord's solicitors in connection with the negotiations for preparation of and/or approval and/or completion of this agreement and the said lease and against all stamp duties payable thereon and shall pay such part of such costs charges and expenses relating to the negotiations for preparation of and/or approval of this agreement and the draft of the said lease and/or completion of this agreement upon the exchange of this agreement and shall pay the balance of such costs charges and expenses upon completion of the said lease or immediately upon this agreement being terminated.

Tenant to pay landlord's agents' commission.

18. The Tenant shall pay and discharge all commission payable to the Landlord's agents Messrs. —— in connection with this agreement and/or the grant of the said proposed lease.

Continuance of agreement notwithstanding grant of lease.

19. This agreement shall remain in force as to any of the stipulations thereof which may not have been performed notwithstanding the grant of such lease as aforesaid.

Any payment due to landlord, the landlord's solicitors, architect or other agent to be paid, at landlord's request, out of deposited sum.

20. Where any payment shall become payable by the Tenant to the Landlord or to h architect or solicitors or other agent under any provision herein contained and shall not be so paid such payment shall upon written request by the Landlord or h solicitors be met (so far as the said deposited sum of £—— shall extend) by a release from such sum to the Landlord or to h architect or solicitors (as the Landlord may request) but any such release as aforesaid shall not (save as to the payment of the sum which such release shall discharge) release the Tenant from or affect or modify any liability of the Tenant under any provision herein contained.

Method of ascertainment of damages in the event of breach of agreement after old buildings having been pulled down or

21. The property as now constituted forms the principal part of the Landlord's estate and having regard to the fact that the Landlord has been invited by the Tenant to enter into this agreement upon the representation made by the Tenant (as he doth hereby admit) that the Tenant's obligations will be in all respects fully carried out so as to leave on the land property fully completed and yielding at least an income of £—— per

annum it is accordingly agreed and declared by the Tenant and the Guarantors (without in any way limiting or restricting the Landlord's remedies hereunder or arising on a breach of this agreement or the scope thereof) that in any adjudication of or upon the Landlord's remedies (whether in proceedings by arbitration or otherwise) consequent upon a breach of this agreement any damages recoverable by the Landlord (if damages shall be claimed by h) shall in the event of the Landlord not proceeding to completion of the demolition of the old buildings and/or the erection of the new buildings be assessed on the footing that an income at least equal to the income receivable by the Landlord at the date hereof by way of rent from the old buildings would continue to be paid to the Landlord indefinitely and that in no event would such income be reduced Accordingly if the old buildings shall have been partially or fully demolished and whether any part of the works in connection with the new buildings shall have been executed or not (the Landlord being under no obligation to carry out any works thereto in the nature of building or otherwise) the damages payable shall be at least of such an amount as will be sufficient— partially demolished (*f*).

(a) to discharge all outstanding legal costs charges and expenses incurred by the Landlord in connection with the preparation approval and completion of this agreement and the preparation and approval of the lease to be granted as hereinbefore mentioned and any other costs charges and expenses incurred by the Landlord and which would not have been incurred but for this agreement (including in particular but without derogating from the generality of the foregoing the solicitor and client costs of any proceedings and any fees and expenses of the Landlord's architect and/or surveyor) and

(b) to purchase English Government Stock of an amount

(*f*) It is thought that clause 21 gives a genuine pre-estimate of damages, but even if this should not be so it will be seen that by clause 22 (a) (ii) the guarantors agree by way of indemnity to make up any damages awarded to the estimated amount as well as to pay any damages awarded and not paid by the building tenant.

sufficient to produce (at the date of purchase) out of the income thereof a gross yearly income equal to the gross rents receivable by the Landlord at the date hereof (before deducting Schedule A tax)

From the amount of such damages so ascertained there shall be deducted—

(i) Any balance of the said sum of £—— not applied pursuant to any of the provisions hereinbefore contained which shall be received by the Landlord

(ii) Any sum which the Landlord may obtain upon a sale of the site and of any buildings or erections (complete or incomplete) thereon Provided that if at the date of judgment being given in any proceedings in which such damages shall be assessed such sale has not yet taken place then the sum to be deducted under this sub-clause shall be the fair value to a willing purchaser of the site together with all buildings or erections (complete or incomplete) thereon.

Agreement by guarantors:

22. (a) In consideration of the Landlord entering into this agreement with the Tenant at the request of the Guarantors the Guarantors hereby jointly and severally agree with the Landlord as follows namely:—

(i) that tenant will perform obligations of agreement and guarantors to continue liable notwithstanding rescission of agreement or re-entry by landlord;

(i) That the Tenant shall duly and punctually pay the rent payable under these presents and perform and observe the agreements and conditions herein contained and on the part of the Tenant to be performed and observed and further that any time allowed or other indulgence granted to the Tenant or any other thing whereby the Guarantors if sureties only might be released shall not release or modify the liability of the Guarantors hereunder nor shall determination of this agreement by rescission under clause 8 hereof or re-entry under clause 12 release or modify the liability of the Guarantors in respect of any obligation or liability of the Tenant which shall upon or after such rescission or determination arise or continue to subsist the intention being that the liability of the Guarantors hereunder shall continue

until all the obligations hereunder on the part of the Tenant have been fully complied with

(ii) That in the event of the disclaimer of these presents by the liquidator upon the Tenant (being a corporation) entering into liquidation or in the event of the disclaimer of these presents by the trustee in bankruptcy of the Tenant (being an individual) or in the event of the liability of the Tenant under these presents being determined by any other means then in any of the said events the Guarantors will immediately on being requested by the Landlord so to do forthwith carry out and comply with and proceed continuously to discharge all the obligations of the Tenant hereunder or such of them as shall then remain to be performed and observed in the same manner in all respects as if the liability of the Tenant had not been determined and upon all of such obligations being discharged in manner prescribed by this agreement the Guarantors shall accept upon the same terms and conditions the same lease of the site and the buildings erected thereon as would have been granted to the Tenant if h had complied with all h obligations hereunder.

(ii) guarantors to remain liable notwithstanding disclaimer of agreement in any bankruptcy or liquidation proceedings or other events and to complete works and accept lease;

(iii) That in the event of any damages awarded to the Landlord in consequence of a breach of this agreement being less than the amount as estimated in clause 21 hereof (hereinafter called "the estimated damages") or if the estimated damages or other damages shall be awarded and shall not be paid by the Tenant the Guarantors (notwithstanding that this agreement may have been previously determined) shall (by way of indemnity and not of guarantee) pay and make good to the Landlord in the first case the deficiency and in the second case the amount remaining unpaid

(iii) guarantors to make up damages if less than those to be assessed under clause 21 and to pay any damages awarded against tenant and not paid (*f*).

(b) For the consideration aforesaid the Guarantors hereby jointly and severally agree with the Landlord and as a separate agreement with the Tenant—

(i) that they will not prove and shall not be entitled to prove in such bankruptcy or liquidation as aforesaid in respect

Guarantors agree not to prove in

any bankruptcy or liquidation proceedings of tenant.

of any loss or damage which they may suffer by reason of any such disclaimer or as aforesaid or under the last sub-clause hereof or by reason of their obligations under this present clause any rule of law or equity to the contrary or statutory or other right notwithstanding and

Guarantors to join in lease to tenant, as guarantors, if granted to the tenant.

(ii) that they will if the said lease shall be granted to the Tenant join therein as guarantors upon the terms and conditions of the guarantee contained in the draft of the said lease as scheduled hereto.

Arbitration clause.

23. If any difference shall arise between the parties or their respective representatives touching their respective rights or liabilities under this agreement the matter in dispute shall be referred to the determination of a single arbitrator in case the parties agree upon one otherwise to two arbitrators one to be appointed by each party or their umpire in manner provided by the Arbitration Acts 1889 to 1934 or any statutory modification or re-enactment thereof.

Time to be of the essence.

24. In relation to all the obligations of the Tenant under these presents time shall in all respects be of the essence of the contract.

Provision as to service of notices.

25. All notices consents and approvals to be given hereunder on behalf of the Landlord shall be in writing and unless herein otherwise provided shall be signed by the Landlord and all such notices shall be either delivered to the Tenant or left for h at h usual or last known place of residence or business in England or on the site.

As witness *etc.*

The First Schedule above referred to.

[*Description of the site.*]

The Second Schedule above referred to.

[*Particulars of the leases.*]

The Third Schedule above referred to.

[*Form of lease.*]

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